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Supreme Court, U.S.
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No. _____

In The
UNITED STATES SUPREME COURT
OCTOBER TERM, 1998

RICARDO GONZALEZ-NAVARRO and CONCHITA NAVARRO de GONZALEZ, Petitioners

v.

LUIS BONILLA et al., Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the court of appeals violated defendants' constitutional right to due process by *sua sponte* amending the complaint, *de facto*, and in violation of Rule 15(b) of the Federal Rules of Civil Procedure with material that plaintiffs had filed in opposition to petitioners' motion for summary judgment when: 1) the trial court held that the complaint had not been pled with the particularity required to state a cause of action for fraud; 2) defendants, therefore, voluntarily defaulted as to liability on that complaint; and 3) the court of appeals subsequent held the amended complaint sufficient and defendants liable on the fraud counts without having had the opportunity to defend the amended complaint as to these counts.

Whether the court of appeals erred in holding in a multi-defendant case, where not all defendants had defaulted and where there was a bifurcation order in effect separating the liability and damage phases of the trial, that petitioners waived their right to a jury trial when they filed a motion consenting to the entry of default in the liability phase.

PARTIES TO THE PROCEEDINGS BELOW

Petitioners herein, Ricardo Gonzalez-Navarro and Conchita Navarro de Gonzalez were defendants in the district court as were two companies Trebol Motors Corporation and Trebol Motors Distributor Corporation (collectively "Trebol") owned by them or, a related company, Trebol Realty Corporation.

Plaintiffs, Luis Bonilla et al, are a certified class of individuals and corporations who, between 1983 and 1993, purchased 9,077 cars of the 200 series manufactured by Volvo Car Corporation ("Volvo"). The named plaintiffs are Luis A. Bonilla, Carmen M. Ortiz, and the legal conjugal partnership formed by them; Miguel A. Mercado, Betsy Vazques, and the legal conjugal partnership formed by them; Pedro Umpierre, Nancy Torregrosa, and the legal conjugal partnership formed by them; 200 Fortaleza Jewelry, Inc.; Cecilio Santiago Toledo, Yosecelinda Ciordia Santiago, and the legal conjugal partnership formed by them; Jose M. Hernandez Rodriguez, Antonia Lopez Caceres, and the legal conjugal partnership formed by them; Wanda I. Santiago Santiago; Alberto Colon Valentin; and Rafael A. Cox.

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

RICARDO GONZALEZ-NAVARRO and CONCHITA NAVARRO de GONZALEZ, *Petitioners*

v.

LUIS BONILLA et al., *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Ricardo Gonzalez-Navarro and Conchita Navarro de Gonzalez (the Gonzalez defendants) respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals, App. at A1-A38, is reported at 150 F.3d 77 (1st Cir. 1998). The opinions of the district court, App. at A42-A102, are unreported.

JURISDICTION

On July 28, 1998, the First Circuit Court of Appeals vacated the judgment against petitioners and remanded the case to the lower court. Petitioners' motion for rehearing was denied by order dated October 7, 1998 and entered on October 8,

1998. App. at A39. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the 14th Amendment of the U.S. Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Rule 9(b) of the Federal Rules of Civil Procedure provides:

> **Fraud, Mistake, Condition of the Mind.** In all averments of fraud or mistake the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

Rule 15(b) of the Federal Rules of Civil Procedure provides in part:

> **Amendments to Conform to the Evidence.** When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause

them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the party's action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

Additionally, Fed. R. Civ. P. 38 (a) provides:

Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

Further, Fed. R. Civ. P. 39(b) provides:

By the Court. Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by a jury of any or all issues.

Another Federal Rule of Civil Procedure is Rule 54 which provides in part:

(c) Demand for Judgment. A judgment by default shall not be different in kind from or

> exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings.

STATEMENT OF THE CASE

Plaintiffs filed this class action civil RICO complaint in 1992 against: Volvo Car Corporation;[1] Trebol,[2] the Volvo distributorship in Puerto Rico; and the Gonzalez defendants, who are the son and widow of the founder of Trebol. The complaint alleged that the defendants violated RICO by importing Volvo DL's into Puerto Rico, adding accessories to the cars and labelling them as Volvo GL's or GLE's. As described in respondents' Third Amended Complaint, "The aim of the schemes [to defraud] was the sale of the motor vehicles disguised or improperly designated as 200 Series GLE, GL and DLWA Volvo models in Puerto Rico to derive racketeering

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[1] The judgment against Volvo was reversed by the First Circuit in a separate appeal. Bonilla v. Volvo Car Corporation, 150 F.3d 62 (1st Cir. 1998).

[2] Trebol would have been a party to this petition except for their intervening bankruptcies and the decision of the court of appeals that the trial court's entry of judgment was a violation of the automatic stay provisions of 11 U.S.C. §362(a)(1). App. at A33.

income." Federal jurisdiction in the court of first instance was based on 18 U.S.C. §§ 1961 *et seq.*

On the defendants' motion, the district court ruled in May of 1995 that the Second Amended Complaint and plaintiffs' RICO statement did not satisfy the requirements of Rule 9(b). App. at A98. In March of 1996, when plaintiffs filed a motion for leave to file a Third Amended Complaint, new causes of action under the Puerto Rico Civil Code, including Puerto Rico Law 77, nullity of the contract of sale, and "temerity" were raised, but the lower court denied the motion and did not allow plaintiffs to add these claims, ruling:

> The third amended complaint raises for the first time causes of action pursuant to the Puerto Rico Civil Code. This case is scheduled for Trial on June 10, 1996. To allow plaintiffs to amend the complaint at this time would cause undue delay to the proceedings and would be unfair to all parties, who are completing final stages of pretrial proceedings in preparation for trial.

App. at A95-A96. On May 1, 1996, the Court allowed the filing of a different Third Amended Complaint which merely substituted two named plaintiffs and incorporated an amended class definition, but did not contain the new causes of action. App. at A102. As the First Circuit later conceded, the Third Amended Complaint was "not different in any material respect" than the Second Amended Complaint. App. at A10.

Meanwhile, on April 16, 1996, the trial court had issued a Bifurcation Order which provided that the damage phase of the trial was to be separated from the liability phase. The lower court's order succinctly stated:

> the Court hereby GRANTS plaintiffs' motion for bifurcation of the Trial into a liability phase and a damages phase. The same jury shall sit and decide all issues of fact in the two phases.

App. at A93. General class damages were not to be litigated during the liability portion of the trial.

The class issue, motion practice, and discovery became overwhelming to Trebol and the Gonzalez defendants. Faced with (1) hundreds of thousands of dollars in unpaid legal fees (2) the rule of law announced in Rodriguez-O'Ferral v. Trebol Motors Corporation, 998 F.2d 1001, 1993 WL 261993, (1st Cir. 1993),[3] and (3) the trial court's specific ruling that the complaint and the RICO statement did not comply with Rule

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[3] Before filing the instant case, plaintiffs' counsel filed Rodriguez-O'Ferral v. Trebol Motors, No. 91-1604 (CCC)(D. P.R.). Rodriguez-O'Ferral was also a civil RICO class action involving the Volvo DL and the Volvo GLE. The complaint was dismissed by U.S. District Judge Cerezo and that decision was sustained on appeal by the First Circuit, see Rodriguez-O'Ferral, 998 F.2d 1001, 1993 WL 261993 at 3 (plaintiffs alleged Trebol defrauded its customers "by selling Volvo DL vehicles 'doctored' by Trebol to look like their pricier cousin -- the Volvo GLE") as were the sanctions imposed on plaintiffs' counsel by Judge Cerezo, see O'Ferral v. Trebol Motors Corporation, 45 F.3d 561 (1st Cir. 1995).

9(b), the Gonzalez and Trebol defendants on advice of counsel filed a pleading "consent[ing] to have a default entered against them as to the factual averments of the Third Amended Complaint."

The case proceeded to trial on the liability portion solely against Volvo. Notwithstanding the Bifurcation Order, the trial court permitted plaintiffs to elicit not only the damages of the representative plaintiffs, but of the class as well. This was done at a time when the Gonzalez and Trebol defendants' counsel was not present, when their presence had been excused, and without notice. App. at A109-A110.

On July 25, 1996, the jury returned a verdict of liability against Volvo. Without notifying counsel for the Gonzalez and Trebol defendants, the trial court set the damage phase for two days hence. Plaintiffs took the position that the Gonzalez and Trebol defendants were not needed for the damage phase and that damages could be assessed against them at a later stage. App. at A111-A112.

The trial court limited the damage phase of the trial to closing arguments. The Gonzalez and Trebol defendants were neither notified nor given an opportunity to present evidence.

On July 30, 1996, the jury returned a verdict of $43,197,100 against Volvo which the trial court trebled to $129,591,300.[4]

On August 29, 1996, the trial court considered the issue of the damages to be awarded against the Gonzalez and Trebol defendants. These defendants argued that they were entitled to have the jury assess the damages and that they had a constitutional right to have a meaningful opportunity to be heard, present evidence, and cross-examine plaintiffs' experts as to the alleged damages. The August 29 "hearing" was perfunctory, without a jury, and no evidence was presented in the traditional manner.

On October 10, 1996, the trial court entered Final Judgment awarding $129,591,000 in damages against the Gonzalez and Trebol defendants.[5] App. at A58-A60. The judgment assessed the very same damages against the Gonzalez

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[4] The jury verdicts did not include attorneys' fees and costs. The lower court's sanctions and award of over $3 million in such attorneys' fees and costs against all defendants, including the Gonzalez defendants, were reversed and remanded by the First Circuit. Bonilla v. Volvo Car Corporation, 150 F.3d 88 (1st Cir. 1998).

[5] On September 30, 1996, the Trebol defendants filed Chapter 11 bankruptcy petitions and on October 1, 1996, through an "Informative Motion," the lower court was notified both of the filing and of the automatic stay of suits pursuant to 11 U.S.C. §362(a).

and Trebol defendants that were assessed by the jury against Volvo. App. at A58.

On appeal, the Court of Appeals for the First Circuit acknowledged that the

> complaint did not point out the alleged connection between the individual Gonzalez defendants and any specific act of wrongdoing, making only general accusations that the Gonzalez held important ownership, executive and employee positions in Trebol

and that "arguably" the complaint did not describe the fraud with sufficient particularity since no individual instance was identified. App. at A12. Nevertheless, the court ruled that plaintiffs' opposition to the motion for summary judgment acted as a *de facto* amendment to the complaint. App. at A13. The court of appeals overlooked the fact that the factual material that it believed supplemented the complaint related to a legal theory that had been rejected by the trial court.

REASONS FOR GRANTING THE WRIT

The Gonzalez defendants respectfully request that this Court grant the petition for a writ of certiorari to resolve the apparent conflict between Fed. R. Civ. P. 15(b) and decisions of the Courts of Appeals for the Fourth, Tenth, and Eleventh Circuits, which do not permit a post-trial amendment to conform to the proof if it would surprise and prejudice the opposing party, and the decision here of the First Circuit Court of Appeal, which *sua sponte* added, *de facto* and post-default,

an amendment to the complaint rejected by the trial court to save a complaint that the First Circuit acknowledged was otherwise insufficient.

The Gonzalez defendants further submit that condoning the trial court's departure of their right to a jury trial in a multi-defendant case where there was a non-defaulting defendant and where there was, at the time the Gonzalez defendants consented to a judgment being entered against them only as to liability, a bifurcation order separating the liability and damage phases is not only a deprivation of defendants' constitutional rights, but such a wide departure from accepted and usual course of judicial proceedings to call for this Court to exercise its supervisory power.

ARGUMENT

I. Permitting An Amendment To The Complaint After Default, with Material Rejected By The Trial Court, is in Conflict with Fed. R. Civ. P. 15(b) and Cases Decided Thereunder

Rule 15(b) provides that a party can amend the complaint to conform to the proof **after** trial. In general, amendments are not permitted if the opposing party did not have a fair opportunity to defend or if the opposing party could offer additional evidence if the case were tried on a different theory.

In R.A. Pohl Constr. Co. v Marshall, 640 F.2d 266 (10th Cir. 1981), the Tenth Circuit, in interpreting Fed. R. Civ.

P. 15(b), held that an OSHA administrative law judge erroneously amended a citation and found a violation of trenching standards for work in soft soil after a trial had been conducted based on a citation for violation of the different standards for work in hard soil. The court noted that the

> test whether pleadings should be deemed amended . . . is whether the opposing party had a fair opportunity to defend and whether it could offer additional evidence if the case were retried on the different theory.

640 F.2d at 267. Moreover,

> there must be a very clear indication in the record that the evidence, sought to be used as a basis for the argument that there was implied consent, was introduced to raise a new issue.

640 F.2d at 268. Because the soil condition had not been an issue and therefore was not tried, no evidence was submitted and the petitioner had not consented to the amendment. Accordingly, the order finding a violation of the soft soil standards was reversed. 640 F.2d at 268.

Similarly, in Wesco Mfg., Inc. v. Tropical Attractions of Palm Beach, Inc., 833 F.2d 1484, 1486-87 (11th Cir. 1987), the Eleventh Circuit noted that a

> party cannot be said to have impliedly consented to the trial of an issue not presented by the pleadings unless that party should have recognized that the issue had entered the case at trial.

The individual defendant did not impliedly consent to an amendment seeking to pierce the corporate defendant's veil and hold the individual liable on a contract claim. Because the "introduction of evidence arguably relevant to pleaded issues cannot serve to give a party fair notice that new issues are entering the case," the judgment holding the individual personally liable for the contract claim was reversed.

In Elmore v. Corcoran, 913 F.2d 170 (4th Cir. 1990), the defendant municipal officials were found liable for denial of the plaintiff's right to due process by terminating her water service before the deadline for paying had passed. 913 F.2d at 172. The complaint, however, had been "grounded entirely on [plaintiff's] claims of false arrest and/or false imprisonment" after she kicked the police chief when he attempted to turn off her water. 913 F.2d at 171. Although plaintiff argued that defendants consented to the trial of this issue, the Fourth Circuit reversed the judgment, holding that the

> trial court's vague reminiscence that a due process theory relating to a property right in water service might be available to [plaintiff] was not sufficient to place [defendants] on notice that the outcome of their case would turn on this theory.

913 F.2d at 173, n.8. Judgment for plaintiff was therefore reversed.

Finally, in Cioffe v. Arnold F. Morris & Jet Fingers, Inc., 676 F.2d 539 (11th Cir. 1982), plaintiff sued for recision of a

November agreement that superseded a June agreement and sought enforcement of the June agreement. After a bench trial, the court held that plaintiff had a right to rescind the November agreement (which would not revive the June agreement) or collect damages for its breach. 676 F.2d at 540. The court also awarded damages on an account stated theory for goods shipped outside the June and November agreements. On a motion to reconsider, however, the court "concluded that the defendant did not consent to trial of the account stated issue," and reversed that portion of the judgment. 676 F.2d at 541.

The court held that

> a judgment may not be based on issues not presented in the pleadings and not tried with the express or implied consent of the parties. Moreover, implied consent under Rule 15(b) will not be found if the defendant will be prejudiced; that is, if the defendant had no notice of the new issue, if the defendant could have offered additional evidence in defense, or if the defendant in some other way was denied a fair opportunity to defend.

676 F.2d at 541-42 (citation omitted). Although the complaint sought payment of the invoices under the June agreement, defendant had successfully defended that claim on the ground that the November agreement released him from liability.

> Had the defendant suspected that the invoices had significance independent of the contracts, he could have framed his defense accordingly. The defendant was not given a fair opportunity to

> present a defense relevant to the account stated issue and to permit recovery on that basis would be prejudicial.

676 F.2d at 542. Accordingly, the trial court properly vacated that portion of the judgment based on an account stated theory. 676 F.2d at 543.

In this case, the court of appeals permitted a *de facto* amendment where no motion was made by plaintiffs to amend the pleadings, where the *de facto* amendment had been specifically rejected by the trial court as constituting a RICO violation, and where the amendment was made **after** a voluntary default by defendants who relied on the complaint as it existed at the time of the default. Indeed, in the motion for entry of default, the Gonzalez defendants specifically stated that they were consenting to have a default entered against them as "to the factual averments of the Third Amended Complaint." App. at A3. Ironically, the plaintiffs raised no argument in the First Circuit that such an amendment was necessary or warranted.

The prohibition against permitting a post-default *de facto* amendment is fortified by Rule 54(c) which explicitly precludes entry of a judgment subsequent to a default for more than the *ad damnum*. Thus, a plaintiff can not sue for one amount, obtain a default, and increase the amount after the default has been entered or change the legal theory that would increase the damage claim. For example, in Marina B. Creation, S.A. v. de Maurier, 685 F. Supp. 910 (S.D.N.Y. 1988), the

Court held that in a default situation, plaintiff was not entitled to treble damages on his patent claims, because such request was not included in the *ad dammum*. Even though there is a well-known statutory provision allowing for trebling of damages in a patent case, the court held: "No demand for treble damages is made. Thus, the Court will not increase beyond what was originally sought." 685 F. Supp. at 912.

Here, the Gonzalez defendants had voluntarily defaulted and it can not be gainsaid that they consented in any manner to the *de facto* post-default amendment. Moreover, the Gonzalez defendants not only had no opportunity to defend on these issues, but they specifically relied on the state of the pleadings in making the decision not to contest the factual averments of the Third Amended Complaint. The inherent unfairness is exacerbated by the fact that the trial court rejected what the court of appeals added and which became the sole basis for sustaining the sufficiency of the newly constituted complaint.

The court of appeals did not rely on any pertinent authority to justify its decision to permit a post-default *de facto* amendment. The two cases relied upon by the court of appeals, Elias Bros. Restaurants v. Acorn Enterprises, 831 F. Supp. 920 (D. Mass. 1993), and Buccino v. Continental Assurance Co., 578 F. Supp. 1518, 1524 n.5 (S.D.N.Y. 1983), did not involve default judgments, so the timing of the amendments was not critical. In Elias Bros. Restaurants, the magistrate deemed the

pleading to be amended by the summary judgment papers rather than dismissing and then permitting an amendment. The magistrate's decision was pragmatic and there was no difference between amending *de facto* and dismissing and answering. Similarly, in Buccino, the motion to dismiss and the motion for summary judgment were considered simultaneously and the court's decision was pragmatic. Since neither Elias Bros. nor Buccino involved default judgments, the impact of those decisions on a defaulting defendant in a multi-party case was not an issue and no rights were gained or lost. In this case, however, the Gonzalez defendants' rights were abrogated by the post-default justification of a *de facto* complaint.

The proper procedure would be to permit plaintiffs to amend the complaint in the district court. Defendants could then deny those allegations and the case could proceed to trial on those issues. While the court of appeals labelled that procedure as "silly," App. at A12, with all due respect, that procedure is mandated by Rule 15(b) which either prohibits, as here, an amendment if it prejudices defendant or requires a continuance to enable the objecting party to meet such evidence. It is manifestly unfair for a party to choose to voluntarily default based on the record as it existed at the time of default and then to have the record changed on appeal without notice and without an opportunity to be heard. Requiring an amend-

ment allows defendants to make an intelligent choice as to whether, given the "new" complaint, they still want to default.

Here, the court of appeals changed the complaint after the default to create a cause of action even though the lower court had found that the complaint was insufficient at the time of the default. Ignoring Fed. R. Civ. P. 15(b), the court of appeals held that requiring plaintiffs to amend would be "silly." App. at A12. Had plaintiffs been required to amend, the Gonzalez defendants could have denied those allegations, which would have put each party exactly where they belonged. Plaintiffs would not have obtained a default judgment on a defective complaint and the Gonzalez defendants would not have defaulted on a claim that was held sufficient.

Defendants after a diligent and exhaustive search could not find a single case that even remotely supports what the court of appeals permitted to be done to them. Permitting a *de facto* amendment in the circumstances of this case makes a mockery of traditional notions of notice and a meaningful opportunity to be heard.

There is no principle more ingrained in our system of justice than the right to be heard. In Windsor v. McVeigh, 93 U.S. 274 (1876), this Court roundly condemned a procedure in which the land of confederate soldiers was escheated and the respondent was not given an opportunity to be heard. The

Court referred to the action of the trial court as no more than a "judicial fiat" totally inconsistent with due process.

In Boddie v. Connecticut, 401 U.S. 371 (1971), this Court commenting on this issue stated:

> Early in our jurisprudence, this Court voiced the doctrine that "[w]herever one is assailed in his person or his property, there he may defend," Windsor v. McVeigh, 93 U.S. 274, 277, (1876). See Baldwin v. Harle, 1 Wall 223 (1864); Hovey v. Elliott, 167 U.S. 409 (1897). The theme that "due process of law signifies a right to be heard in one's defence," Hovey v. Elliott, supra, at 417, has continually recurred in the years since Baldwin, Windsor, and Hovey. Although "[m]any controversies have raged about the cryptic and abstract words of the Due Process Clause," as Mr. Justice Jackson wrote for the Court in Mullane v. Central Hanover Tr. Co., 339 U.S. 306 (1950), "there can be doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." Id. at 313.
>
> ...What the Constitution does require is "an *opportunity* . . . granted at a meaningful time and in a meaningful manner," Armstrong v. Manzo, 380 U.S. 545 (1965) (emphasis added), "for [a] hearing appropriate to the nature of the case," Mullane v. Central Hanover Tr. Co., supra, at 313.

401 U.S. at 377-8.

This very principle had been applied in preventing courts from relying upon claims not pled. Thus, the First Circuit has vacated a judgment where based on claims not properly pled. Rodriguez v. Doral Mortgage Corp., 57 F.3d 1168, 1171 (1st Cir. 1993)("while courts should construe pleadings generously, paying more attention to substance than to form, they must always exhibit awareness of the defendant's inalienable right to know in advance the nature of the cause of action being asserted against him"). Also, in Sylvan Beach v. Koch, 140 F.2d 852, 861-62 (8th Cir. 1944), the court reversed on due process grounds a bankruptcy court decision on claims not pleaded holding that due process and fair play "cannot be circumvented by allowing amendments to pleadings to change a cause of action after judgment..."

Defendants respectfully submit that it is not possible to reconcile the prior decisions of this Court with the procedure implemented by the Court of Appeals for the First Circuit.

Defendants respectfully submit that the Gonzalez defendants were deprived of their due process right to notice of what allegations they were consenting to when the court of appeals' decision bolstered and amended *sua sponte* on appeal a complaint that was found not to satisfy the requirements of Rule 9(b) by material filed in opposition to a motion for summary judgment, which was specifically rejected by the trial court as supporting plaintiffs' RICO claim prior to the Gonzalez

defendants' motion consenting to a default as to the factual averments of the Third Amended Complaint,. Moreover, it has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory powers.

II. Defendants were unconstitutionally deprived of their right to have a jury assess damages

Rule 38(a) of the Federal Rules of Civil Procedure refers to the right to a jury as being "inviolate." The right to a jury trial has since the earliest days of the Republic been held to be one of our most precious and fundamental rights.

> The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy.

Parsons v. Bedford, 3 Pet. 433, 446 (U.S. 1830). This Court has always been protective of this fundamental right.

> The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts.

Jacob v. New York, 315 U.S. 752, 753 (1942).

While most rights once waived cannot be resurrected, a jury trial even validly waived can be restored. Fed. R. Civ. P. 39(b) specifically provides that upon motion by a party the

court can empanel a jury notwithstanding that it had been validly waived. In some circumstances, there is even a presumption in favor of a jury trial even where the jury demand had otherwise been waived. See Daniel Intern. Corp. v. Fischbach & Moore, Inc., 916 F.2d 1061 (5th Cir. 1990)(where defendant interposed no objection to late filed jury demand and case had been on jury calendar for seven months prior to defendant's motion to strike, trial court abused discretion when it struck case from the calendar and tried case without a jury); see also Moores v. Greenberg, 834 F.2d 1105 (1st Cir. 1987).

Here, the district court entered the Bifurcation Order and clearly distinguished between the liability and damage phases of the trial. The district court ordered that the jury would decide "all issues of fact in the two phases." The order further provided:

> Accordingly, the Court will conduct a Jury Trial on all issues of liability which are common to the class, with the class representatives presenting evidence concerning their individual damages. The jury will then return a verdict determining whether defendants are liable. If plaintiffs ... are unsuccessful in proving their allegations concerning liability during the first phase of Trial, then the case will end there, and judgment shall be entered for defendants. If, however, plaintiffs are successful in proving their allegations concerning liability, then the issue of damages suffered by each individual class member must be determined.

> This second issue will require the presentation of further evidence and testimony of witnesses, only if there is a genuine issue of material fact. Plaintiffs assert that the amount of damages suffered by each plaintiffs can be easily discerned by a mathematical calculation involving numbers which are clearly set forth in documentary evidence. If such is the case, the Court will entertain the appropriate motions at the relevant time.

App. at A93-A94.

After the Gonzalez defendants agreed not to contest liability, the district court violated its own bifurcation order and merged the damage phase back into the liability phase. The Gonzalez defendants were not notified, and had no opportunity to appear, present evidence, cross-examine witnesses or have the jury decide the issue of damages. After the jury verdict and without an evidentiary hearing, the trial court adopted the jury's award against the defendants.

While the court of appeals vacated the award and remanded the issue of damages to the district court, it explicitly permitted the trial court on remand to determine damages without a jury. App. at A16, A17, A31. In so doing, the Gonzalez defendants respectfully submit that the court of appeals sanctioned a departure by the lower court from an accepted and usual course of judicial proceedings as to call for this Court's exercise of its supervisory power. In fairness, this issue has only been squarely addressed by one district court and

legal commentators such as Moore's, although the conduct sanctioned by the court of appeals erodes scores of decisions by this Court emphasizing the fundamental right to a jury trial.

Finally, should the Court believe that its prior decisions respecting the fundamental importance of a jury trial and the concomitant issue of waiver do not control, then the Gonzalez defendants respectfully suggest that the petition should be granted under Supreme Court Rule 10(c) as the court of appeals has decided an important question of federal law that has not been decided by this Court and should be.

Even though this was a multi-defendant case with a non-defaulting defendant, the court of appeals held that the ordinary rule for a defaulting defendant applied and "the right to a jury trial was gone." App. at A17. The court of appeals overlooked the significance of the Bifurcation Order which was in effect at the time of the default, while acknowledging that the Gonzalez defendants could have reserved the right to offer evidence to the jury in the damages phase. App. at A17. In fact, such reservation is expressly what defendants attempted to accomplish here by limiting their pleading to liability only.

The Gonzalez defendants find themselves deprived of a jury trial on the issue of damages which they had not intentionally waived, not because of any affirmative action on their part, but because plaintiffs successfully enticed the district court to permit the damage phase to be merged into the liability phase

and gave no notice to the Gonzalez and Trebol defendants that they were circumventing the Bifurcation Order.

The ordinary rule for a defaulting defendant, according to 8 Moore's Federal Practice, §38.34[5] (3d ed. 1998), is that there is no constitutional right to a jury trial on damages after a default. However, the cases cited therein in support of the "ordinary" rule all involve defaults ordered either after a party had failed to answer or defaults that were ordered as discovery sanctions and none of these cases involved a default by only one party in a multi-party case.[6] Plainly, where a party is non-compliant and either fails to answer or to comply with discovery orders, a meaningful jury trial cannot be had. Those factual scenarios are inapplicable to this case where the Gonzalez defendants had vigorously participated in the litigation and in the discovery prior to the default and had attempted to preserve

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[6] Matter of Dierschke, 975 F.2d 181, 185 (9th Cir. 1992)(intentional failure to answer); Adriana Intern. Corp. v. Thoeren, 913 F.2d 1406 (9th Cir. 1990), *cert. denied* 498 U.S. 1109 (1991) (default ordered where despite monetary sanctions, plaintiff repeatedly failed to appear at depositions and failed to comply with court-ordered production of documents); Frankart Distributors v. Levitz, 796 F. Supp. 75 (E.D.N.Y. 1992)(defendant never answered and request for jury made two years after matter sent to magistrate for hearing). Manifestly, where a party neither answers nor complies with discovery orders, a meaningful jury trial cannot be had.

their rights by consenting to default only "as to the factual averments of the Third Amended Complaint."

As the First Circuit acknowledged, App. at A16 n.5 (citing 10 Moore's Federal Practice §55.25, at 55-45-47 (3d ed. 1998)), the exception to the ordinary rule arises in a multi-defendant case because permitting the defaulting defendant to participate in the damage phase avoids the risk of inconsistent verdicts.

Given the Bifurcation Order that the Gonzalez defendants relied on at the time of default, the case at bar is much more like Bass v. Hoagland, 172 F.2d 205 (5th Cir. 1949), *cert. denied* 338 U.S 816 (1949). There, Hoagland sued Bass and another in federal court in Kansas and demanded a jury trial. Bass filed an appearance and answer, but then his attorney withdrew. A default judgment was entered for the amount prayed in the complaint, but there was no three-day notice as required by Rule 55(b). Hoagland then attempted to enforce the judgment in Texas some two and a half years later. The 5th Circuit held that Bass had been denied due process both because he had no notice and because he had not waived his right to rely on plaintiff's jury demand. 172 F.2d at 208-09.

Here, at the time the Gonzalez and Trebol defendants filed their Default Motion, they expected the right to participate in the damage phase of the trial before the same jury that heard the liability phase. Pursuant to Montcalm Publishing Corp. v.

Ryan, 807 F.Supp. 975 (S.D.N.Y. 1992), a multi-defendant RICO case, "the proper procedure is to consolidate the inquest to determine the level of damages as to the Defaulting Defendants with the damages aspect of the trial against the non-defaulting defendants. ...See 6 Moore's Federal Practice ¶ 55.06 at 55-42 n. 17 (2d. ed. 1988)." Since the non-defaulting defendant had its damages assessed before a jury, restoring the *status quo ante* means affording the Gonzalez defendants their right to a jury trial.

CONCLUSION

For the reasons set forth herein, the petitioners, the Gonzalez defendants respectfully request that this Court grant their petition for certiorari.

Respectfully submitted,

Michael J. Rovell
Counsel of Record

UNITED STATES COURT OF APPEALS
For the First Circuit

No. 97-1140

Luis BONILLA, ET AL.,
Plaintiffs, Appellees,

v.

TREBOL MOTORS CORPORATION, ET AL.,
Defendants, Appellees.

Ricardo Gonzalez-Navarro and Conchita Navarro De Gonzalez,
Defendants, Appellants.

No. 97-1143

Luis BONILLA, ET AL.,
Plaintiffs, Appellees,

v.

TREBOL MOTORS CORPORATION, ET AL.,
Defendants, Appellants.

No. 97-1145

LUIS BONILLA, ET. AL.,
Plaintiffs, Appellants,

v.

TREBOL MOTORS CORPORATION, ET AL.,
Defendants, Appellees.

APPEALS FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

(Hon. Jaime Pieras, Jr., Senior U.S. District Judge)

Before
Selya, Circuit Judge,
Campbell,[1] Senior Circuit Judge,
and Boudin, Circuit Judge.

Michael J. Rovell and Charles A. Cuprill-Hernandez with whom Jewel N. Klein, Law Offices of Michael J. Rovell, and Law Offices of Charles A. Cuprill-Hernandez were on joint brief for defendants Ricardo Gonzalez-Navarro, Conchita Navarro de Gonzalez, Trebol Motors Corporation and Trebol Motors Distributor Corporation.

Allan Kanner with whom Conlee Schell Whiteley, Allan Kanner & Associates, P.C., Paul H. Hulsey, Frederick J. Jekel, Theodore H. Huge, Ness, Motley, Loadholt, Richardson & Polle, P.A., Jose F. Quetglas Jordan, Eric Quetglas Jordan, Zygmunt Slominski, Quetglas Law Offices, Daniel Harris and Law Offices of Daniel Harris were on brief for plaintiffs Luis Bonilla, et al.

July 28, 1998

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[1]Senior Circuit Judge Leven H. Campbell heard oral argument in this matter, but did not participate in the drafting or the issurance of the panel's opinion. The remaining two panelists therefore issue this opinion pursuant to 28 U.S.C. § 46(D)

BOUDIN, Circuit Judge. This opinion, the second in a series of three, is a companion to our decision in Bonilla v. Volvo Car Corporation, No. 97-1135, 150 F.3d 62 (1st Cir.1998), decided this day ("Volvo "). That decision sets forth a description of the litigation, including the allegations made by the plaintiffs, the course of proceedings, and the disposition of claims in the district court. This opinion is directed to the merits appeal of the defendants other than Volvo, specifically Trebol and the Gonzalez defendants, and the cross-appeal by the plaintiffs. We assume the reader's familiarity with the Volvo opinion.

In the district court, Trebol and the Gonzalez defendants litigated actively through discovery and summary judgment proceedings during the four years between the filing of the complaint and the trial. But, as recounted in Volvo, three days before the trial scheduled for June 24, 1996, Trebol and the Gonzalez defendants consented to the entry of default against them "as to the factual averments of the Third Amended Complaint." After the liability verdict and the

subsequent damage verdict against Volvo, Trebol and the Gonzalez defendants resumed their participation in the case.

Whether and to what extent Trebol and the Gonzalez defendants may have monitored the Volvo trial is unclear, but they were not invited to participate in the damage phase of the Volvo trial; that phase was itself abbreviated because--despite the original bifurcation order--the plaintiffs and Volvo relied entirely on liability-phase evidence and simply presented arguments to the jury. The jury then assessed damages only against Volvo and not against Trebol or the Gonzalez defendants.

The damage verdict against Volvo was delivered by the jury on August 1, 1996. On August 19, the plaintiffs filed a motion to assess damages against Trebol and the Gonzalez defendants. The next day, August 20, these defendants were given telephone notice that a hearing on the matter was scheduled for August 29, nine days hence. The Gonzalez defendants immediately filed a motion (on August 20) requesting a postponement of the hearing, pointing to the

very short notice and the fact that counsel would be out of the country taking depositions in Finland and Spain during the two weeks surrounding the proposed hearing. Counsel suggested September 26 and 27 as convenient dates for the hearing.

So far as the record reveals, the court denied this motion for continuance on August 21, but this order was not entered until August 27. That day, the Gonzalez defendants filed a joint motion requesting a pretrial conference "prior to the hearing scheduled ***80** for August 29 ... to discuss the parameter [sic] of the hearing and to discuss the applicability of a jury." Similarly, on August 27, the Trebol defendants filed their own motion for a continuance. Neither motion was acted upon prior to August 29, when the parties appeared for the hearing, and the district judge then denied both motions. His rationale, set forth in the order entered August 27 denying a continuance, was this: "If Trebol and Gonzalez codefendants were prepared to go to trial on June 24, 1996,

they should be prepared for a Hearing on the issue of damages more than two months later."

At the August 29 hearing, plaintiffs again relied upon the evidence presented against Volvo, urging that the defaulting defendants had abandoned any right to contest that evidence by failing to appear for the damages phase at the trial. The defaulting defendants offered to present evidence that the district court had excused them from attending the liability trial against Volvo after the default, pointed to the original order for a bifurcated trial on damages and asserted that they were entitled to a jury trial on damages against them. They also complained that the plaintiffs were relying for damage evidence on witnesses from the Volvo liability trial whom the defaulting defendants had never had occasion to cross-examine.

What is most important to these appeals is that the defaulting defendants also renewed their request for an effective opportunity to oppose plaintiffs' damage claim. That damage claim, as we explain below, depended primarily

on plaintiffs' contention that the lower retail prices of Volvo cars in sales on the U.S. mainland reflected the "real" value of the cars in Puerto Rico. The defaulting defendants made a specific offer of proof that, if allowed to collect and present evidence, they would show that this price disparity was a common occurrence for luxury car sales and did not prove the value of the same cars in the Puerto Rico market. The court scheduled no further hearing but took the case under submission.

In an opinion and order dated October 7 but entered October 10, 1996, the district judge determined that Trebol and the Gonzalez defendants were liable for the same damages assessed against Volvo by the jury. The court said briefly that the complaint had charged a conspiracy among all of the defendants and since the four remaining defendants had defaulted on the complaint, they were liable for all damages assessed against Volvo on the ground that a conspirator is responsible for offenses committed by his fellow conspirators. On October 10, the district court entered judgment against

Trebol and the Gonzalez defendants in the same amount as that previously entered against Volvo, namely, $129,591,300.

The defaulting defendants' arguments in these appeals fall into three categories. First, despite their default, they challenge the adequacy of the allegations in the complaint to set forth a cause of action. Second, they claim that they were entitled to a jury trial on damages and that they were improperly denied an opportunity to present evidence at the damages hearing on August 29, 1996.[2] Third, Trebol (but not the Gonzalezes) say that the proceedings against them should have been stayed because the two Trebol corporate defendants filed for bankruptcy (on September 30, 1996) before judgment was entered (on October 10, 1996).

The default judgment and the adequacy of the complaint. Generally speaking, a default judgment bars the

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[2]This latter claim was preserved in the district court, but has only been presented in inchoate form on appeal as an adjunct to the jury trial argument. Although we could treat the argument as waived, we decline to do so because of our concern that the lack of time to prepare for the presentation of evidence together with the damages theory applied, explained below, quite possibly resulted in a serious miscarriage of justice.

defaulting party from disputing the facts alleged in the complaint, but it preserves for appeal arguments of law made below as to whether the facts as alleged state a claim. 10 Moore's Federal Practice, § 55.12[1], at 55-18 to 55-19 (Coquillette et al. eds., 3d ed.1997); see also McGinty v. Beranger Volkswagen, Inc., 633 F.2d 226, 229-30 (1st Cir.1980); Alan Neuman Prods., Inc. v. Albright, 862 F.2d 1388, 1392 (9th Cir.1988), cert. denied, 493 U.S. 858, 110 S.Ct. 168, 107 L.Ed.2d 124 (1989).

In this case, prior to their default in the district court, the defaulting defendants presented a barrage of legal attacks on the complaint in conjunction with motions for summary judgment, and the district court generally rejected these challenges in denying the summary judgment motions.[3] [FN2] Although the summary judgment motions were directed to

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[3]Whether or not a denial of summary judgment is independently reviewable after a final judgment is entered, see 10A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2715, at 266 n.26 (1998) (collecting conflicting cases), defendants' purely legal challenges to the complaint were adequately raised in the district court.

the Second Amended Complaint, the Third Amended Complaint on which the case went to trial was not different in any respect material here. The complaint set forth two different claims of fraud against Trebol and the Gonzalezes.

The first, rather tersely stated, was that the defendants had modified or altered 240 DL models by providing some new accessories and upgraded emblems and then sold these "disguised" vehicles "as if they were factory made models" and for much more than the price that the defendants "would have normally charged for the 240 DL Volvo models with such alterations or modifications." The second claim was that the defendants had a statutory duty under both federal and Puerto Rico law to disclose on a label a range of material facts that they omitted and failed to disclose, including the cars' manufacture as DL (rather than GL or GLE) models, the manufacturer's suggested retail price, the suggested retail

price for optional equipment, and the factory cost of the 240 DL models.[4]

In the district court, Trebol and the Gonzalez defendants made numerous legal attacks on the adequacy of the complaint, but on this appeal they have confined themselves to three: first, that the emblem altering practice and addition of port accessories did not constitute a scheme to defraud and that there was no duty to disclose that final emblems and certain accessories had been added in Puerto Rico. Next, they argue that fraud was not alleged with sufficient particularity in the complaint as required by Fed.R.Civ.P. 9(b). Finally, the Gonzalez defendants argue that there is no explicit allegation that they (as opposed to Trebol) made false representations to customers.

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[4] There is some question how far these two claims fully encompass the five different frauds on which the defendants offered evidence in the liability trial against Volvo. It appears that during discovery the plaintiffs expanded the number of frauds and justified their proof, after the district court denied a further full-scale amendment of the complaint, in order to show a pattern of conduct.

The latter two objections need not detain us long. Arguably, the complaint did not describe the frauds with sufficient particularity insofar as it did not identify any individual instance in which an individual car was sold with a false emblem and accessories added in Puerto Rico nor identify any individual automobile label with specific deficiencies. See Beranger, 633 F.2d at 228. Similarly, the complaint did not point out the alleged connection between the individual Gonzalez defendants and any specific act of wrongdoing, making only general assertions that the Gonzalezes held important ownership, executive, and employee positions in Trebol.

However, plaintiffs' opposition to the motion for summary judgment and related discovery material cited gave sufficient notice of the fraudulent acts alleged and of the basis for associating the Gonzalezes with their alleged commission. A remand at this stage to allow an amendment to the complaint to restate this information would be silly. We therefore follow those courts that, in special circumstances

and only for Rule 9(b) purposes, have treated the plaintiffs' opposition to summary judgment--of which the defaulting defendants had notice-- as a de facto amendment or supplement to the complaint's allegations. E.g., Elias Bros. Restaurants, Inc. v. Acorn Enters., Inc., 831 F.Supp. 920, 922 n. 3 (D.Mass.1993); Buccino v. Continental Assurance Co., 578 F.Supp. 1518, 1524 n. 5 (S.D.N.Y.1983).

Once past the Rule 9(b) objection, there is no doubt that the complaint states at least one valid cause of action under RICO on a fraud theory. Trebol had clear-cut obligations to supply label information under Law 77 and, so far as appears, under the Monroney Act as well. The complaint, as supplemented by the opposition, charges a failure to include full and truthful information; it implicates the Gonzalez defendants; and it asserts use of the mails and injury to plaintiffs. While this is enough to defeat dismissal, the adequacy of the emblem and port accessory claim deserves independent attention because damages could be

affected by the content of the fraud claim or claims that are upheld.

The claim is really two claims in one. In presenting the claim, the complaint at least suggests that the defendants had an obligation--in order to avoid fraud--to tell customers that the emblems and accessories had been added in Puerto Rico rather than in the Volvo factory. This reading of the claim was fully developed by plaintiffs in opposing summary judgment and was pursued against Volvo at trial. For reasons set forth in our Volvo opinion, 150 F.3d at 68-70, we do not think that this version of the claim sets forth a valid cause of action for fraud. Our reasons apply equally to the defaulting defendants whose attack on the complaint in the district court adequately preserved the issue for appeal.

However, the same language in the complaint even more clearly sets forth a different theory of fraud, namely, that as a factual matter there is such a thing as a "real" GL or GLE and that the cars actually sold by Trebol in Puerto Rico were "in reality" simply DLs fraudulently disguised as the

higher priced GLs and GLEs. We now know from the Volvo liability trial that there was no such disguise: GLs and GLEs, whether sold in Puerto Rico or elsewhere, were always DLs with different emblems and a bundle of added accessories that varied from one market to the other. Indeed, the plaintiffs during the litigation appear to have revised, and added to, their fraud claims as this disguise argument proved to be baseless.

The problem for the defaulting defendants, however, is that the defect in this version of the claim is not one of theory but of fact. And having defaulted at the liability trial, these defendants are not automatically in a position to benefit from the facts that it yielded. Since we conclude below that a further proceeding must be held as to damages, the question remains whether plaintiffs can proceed to collect damages on a legally sound but factually erroneous cause of action. This issue is easier to address after addressing the damages issue and explaining the need for a remand--the issues to which we now turn.

Jury Trial and the Opportunity to Present Damage Evidence. Having established that the complaint set forth two independently sufficient claims (although one of them based on a false factual premise), we consider Trebol's argument that it was entitled to a jury trial on damages or at least an opportunity to present evidence relative to damages. The ordinary rule is that a defaulting defendant is entitled to contest damages and to participate in a hearing on damages, should one be held. 10A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2688, at 67-68 (3d ed.1998). But a defaulting defendant is not entitled to a jury trial on damages, although the court may choose to afford one. Id. at 69.[5]

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[5]In a multi-defendant case, courts do sometimes bring in the defaulting defendant at the damage phase, avoiding the risk of inconsistent damage verdicts against defendants who are jointly and severally liable. 10 Moore's Federal Practice, supra, § 55.25, at 55-45 to 55-47 (3d ed.1998). Here, however, such a course--even if it had been considered-- would have been complicated because no separate damage trial involving the presentation of evidence was held, despite the original bifurcation order.

It was open to the defaulting defendants to appear at the liability trial, concede liability to the jury, and litigate before the jury the issue of damages whenever the district court allowed such evidence to be presented. It might also have been allowable for the defaulters to stipulate, at least with the district court's approval, that they would default as to liability but preserve a right to offer evidence to the jury on damages whenever that issue was ripe. But having chosen – simply to default when the case was called for trial, we think that the defaulters were subject to the ordinary rule that their right to jury trial was gone--a rule that reflects the practical need for flexibility where a litigant declines to appear for trial.

We are far more troubled by the district court's refusal to give the defaulting defendants a more substantial opportunity to present evidence at the damages phase. As the case was originally structured, the district court's "bifurcation" order said that there would be three phases: one on liability, a second to determine the measure of damages if liability were established, and a third (probably

involving a special master) to apply the general ruling on damages to specific plaintiffs or groups of plaintiffs. There was never any formal modification of this procedure so far as we are aware.

Nevertheless, during the Volvo liability phase, much of the plaintiffs' evidence was treated as bearing on both liability and damages, despite sporadic objection by Volvo to this course; in all events, Volvo ultimately treated the liability phase evidence as a sufficient basis for litigating damages and did not offer further evidence of its own in this second phase. How much the defaulting defendants knew of this gradual evolution is unclear but there is no indication that they ever waived their right to contest damages.

We are very reluctant to interfere with the discretion of the trial judge in the scheduling of hearings on damages, or anything else, for reasons too obvious to need recounting. See Mendez v. Banco Popular de P.R., 900 F.2d 4, 7 (1st Cir.1990). Yet, in this instance the refusal to allow some additional time beyond nine days to prepare for the hearing

does seem to us to represent an abuse of discretion. And any doubt is resolved by our view that the curtailing of evidence was highly prejudicial and may well have resulted in a gross miscarriage of justice. For this reason we are constrained to order further proceedings on damages.

At the outset, we reject plaintiffs' suggestion that the defaulting defendants were debarred from contesting damages merely because they had defaulted on liability. The stipulated default notice made clear that the defaulters were conceding only the truth of the Third Amended Complaint, and the complaint set forth no specific amount of damages. Nor is it evident why the defaulters should be bound by a jury determination of damages against Volvo made in a proceeding in which their participation was not invited and in which the jury fixed damages only against Volvo.

Plaintiffs argue on appeal that the defaulting defendants monitored the trial sufficiently to obtain notice as to when the jury would be considering the issue of damages--the implication being that if the defaulters wished

to contest damages, it was their duty to advise the court at that time and offer what evidence they had to the jury. This argument is not entirely fanciful. Plaintiffs asserted at the August 29 hearing that counsel for the defaulting defendants had been present in the courtroom during the Volvo trial from time to time. Plaintiffs also argue, somewhat tenuously, that the defaulters' motion to alter or amend the partial default judgment against them reflected an awareness of the trial's progress.

We do not find these arguments persuasive under the present circumstances. Apart from uncertainty as to the factual predicate (i.e., what counsel for the defaulters knew about how the trial unfolded), it does not appear realistic to describe the damages phase of the Volvo trial as an independent, clearly demarcated proceeding to establish damages for all defendants, at which the defaulters' attendance was implicitly expected. On the contrary, the proceeding seems to have been an addendum to the Volvo

trial and, we note, produced a jury verdict against Volvo only.

The district court seemingly thought that the concession of conspiracy by the defaulters (such an allegation was made in the complaint and therefore conceded) automatically made the defaulting defendants liable for any harm done by Volvo. So, arguably, it did--as to conduct within the scope of the conspiracy. But this does not mean that the defaulters were bound by a determination against Volvo as to the amount of damages made by the jury in a proceeding in which the defaulters played no part. We therefore conclude that the defaulters were entitled to offer evidence on damages.[6]

This brings us to the request for a continuance of the damages hearing. To expect the defaulting defendants to be

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[6]It is a different issue whether the district court could rely, in calculating such damages, on the evidence earlier offered in the Volvo trial from which the defaulters voluntarily absented themselves and whether the defaulters could later insist on cross-examining such witnesses. We return to this issue in due course.

able to produce their damage witnesses on nine days' notice--with no prior indication that such a hearing would be scheduled--is hard to understand. Defense counsel's explanation as to his absence from the country and the request for a one-month continuance was not the kind of empty excuse that is customarily brushed aside; and the period of delay requested was not long--representing 30 additional days in a case already pending for four years. Above all, at the hearing the defaulting defendants did not rest on generalities but explained rather specifically (and as it turns out cogently) what they wanted to try to prove at a hearing.

The district court said that the defendants should have been prepared to go on trial in August on the damage issue since they were prepared for a full trial on the merits in June. With respect, this seems to us a non sequitur. The defaulting defendants had ample notice as to the trial date on liability and chose to default; possibly even with notice they were not ready for trial. It would hardly be expected that counsel

would reserve all subsequent dates and have witnesses virtually standing by for a damage hearing with no notice whatsoever as to when it was going to be scheduled. Under these circumstances, we conclude that the denial was error, if prejudicial.

Prejudice there surely was. The damage award against Volvo and the defaulting defendants is almost certainly an overstatement. It is based on the premise that every purchaser of a 240 Volvo in Puerto Rico between 1984 and 1993 was defrauded by the defendants in an average amount of approximately $7,000 per car, less an adjustment made by the jury for Puerto Rico excise taxes. Even if we assume that every single car purchaser was defrauded, the crux of the problem lies in the calculation of damages.

Damages in fraud cases are ordinarily measured either on an out-of-pocket basis or on an expectation theory. See Dobbs, Law of Remedies § 9.2(1), at 695-96 (1993). In this case, the plaintiffs ultimately followed the former approach, urging in effect that they were fraudulently induced

to purchase an item by misrepresentations and non-disclosures, that the cars were worth less than they had paid, and that plaintiffs were therefore entitled to the difference between the purchase price and the lesser "actual value" of what they purchased. The purchase prices are known figures; the problem lies in computing the actual value of the purchased vehicles.

As noted, various plaintiffs testified that they would have paid less for the Volvos they purchased if they had been given accurate label information or had known that the emblem and accessories were added in Puerto Rico. The plaintiffs did not, however, try to quantify how much less they would have paid, and the figure presumably would have varied from purchaser to purchaser. To establish the "actual value" of what was purchased, the plaintiffs called experts who testified as to the selling price of unequipped Volvo DLs in the continental United States. Plaintiffs then argued to the jury that the actual value of what the plaintiffs purchased in Puerto Rico was the continental U.S. price for an unequipped

DL increased by whatever the cost might be of individually purchased equivalent accessories.[7]

The obvious problem with this calculation is the assumption that there is one "actual value" of a Volvo, equipped or otherwise, that is common to both the continental United States and to Puerto Rico. Put differently, the plaintiffs' theory assumes that, had full disclosure been made, Volvos would have been for sale in Puerto Rico for the same prices offered in the continental United States. What the defaulting defendants offered to show, when they sought a hearing on damages, was that the two markets were not the same and that the price of a luxury car in Puerto Rico was customarily higher than the price in the continental United States.

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[7]Plaintiffs' main expert offered charts, classifying purchases by year and various other categories (e.g., GLE 4 door sedan), purporting to compare the average Trebol price in Puerto Rico with the price of a DL on the mainland U.S. (How and where the latter was adjusted for accessories is unclear but not complained of.) The expert failed to account for Puerto Rico excise taxes, but the jury made a reduction, apparently on that account, reducing the average award from about $7,000 to about $5,000 per vehicle.

Puerto Rico is a physically separated area where the direct competition for Volvo sales was likely to come not from other Volvo dealers (there were no other fully established Volvo dealerships in Puerto Rico so far as the record reveals), but from dealers specializing in other expensive cars; and one might reasonably expect there to be fewer such dealers than in New York or Florida. Costs are often higher in smaller markets, and even when they are not, competition is frequently less effective as a constraint where there are fewer immediate competitors.

One might argue that merely to show prices of Volvos in New York or Florida is itself no evidence of the actual value of an equivalently equipped car in San Juan; but we are inclined to think otherwise. Plaintiffs might say that the pricing in a nearby market was at least some evidence of actual value in Puerto Rico and that it was the defendants' responsibility to counter this argument with evidence to defeat the inference. But this, of course, is exactly what the defaulting defendants sought to do and were prevented from

doing because of the district court's refusal to provide additional time.

The defendants did not merely offer to provide such evidence but pointed to a specific way of proving that prices for luxury cars were higher in Puerto Rico than they were in New York or Florida and by a very substantial margin. They offered to produce evidence as to the pricing differential of other widely distributed luxury cars, mentioning specifically BMW, to show that the Puerto Rico prices were very much higher than the continental U.S. prices. One could also imagine securing more broad-ranging evidence from an economist or marketing expert as to why such differentials might be expected. Whether such evidence would entirely undermine plaintiffs' damage showing or merely allow for appropriate adjustment is something on which we need not speculate.

It is no pleasure to remand a proceeding, already long extended, because of the failure to give a thirty day extension. But in this case it is relatively easy to restore the status quo

ante. No jury trial is required: the district judge simply needs to do now what he would have done if he had granted the requested extension, namely, to consider whatever evidence is tendered and reach a conclusion as to damages owed by the defaulting defendants (or at least the Gonzalezes, depending on how the bankruptcy issue is resolved). This may not be easy, but it is no harder now than it would have been earlier.

On remand, damages can certainly be based on the premise that plaintiffs, or at least some of them, would have paid less for their cars in Puerto Rico had they been given the additional information required by the Monroney Act and/or given accurate Law 77 figures instead of the inflated ones to which some of the plaintiffs were exposed. The more difficult question is whether the plaintiffs should be allowed to base their damage calculations on the notion that there was also an implicit misrepresentation or a culpable non- disclosure as to the affixing of emblems and the installation of accessories in Puerto Rico. Whether this will matter is unclear, but we think it useful to address the point.

Our conclusion is that the emblem and part accessories fraud claim is not a legitimate basis for computing damages. Insofar as it involves merely a failure to disclose that emblems and certain accessories were installed in Puerto Rico, this conclusion is easy. We have already determined that failure to disclose this information does not constitute a valid claim under the present circumstances, see Volvo, slip op., 150 F.3d at 68-70, and the defaulting defendants fully preserved this legal objection despite their default.

The greater difficulty is posed by the charge, explicit in the complaint, that there is such a thing as a real GL or GLE--differing in some unidentified way from DLs apart from emblem and accessories and their place of installation--and that the DLs sold in Puerto Rico were essentially disguised versions. There is nothing obviously wrong with this theory of liability; the difficulty is that it rests on a premise that we now know to be false or at least beyond plaintiffs' ability to prove. Should plaintiffs nevertheless be allowed to proceed to collect damages on this false premise,

given that the defendants conceded the facts asserted in the Third Amended Complaint by defaulting at the liability phase of the trial?

We could find no precedent on this peculiar problem, and there may be no single answer independent of circumstances. In the present circumstances, we conclude that the emblem and accessories fraud theory should not be utilized in calculating damages. To the extent that it is independently viable apart from a mere failure to disclose where items were installed, the plaintiffs failed to prove it at trial against Volvo. There is no indication that more could have been proved against the defaulting defendants on this issue, and experts should not be asked to develop factual assertions about damages on a factual premise that was already shown to be untrue.[8]

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[8] If there were any reason to think that plaintiffs would have had a stronger case on this issue against the defaulters than against Volvo, we would certainly allow the theory to stand. But the issue is the same regardless of the defendant, and plaintiffs had every incentive to marshal all their evidence against Volvo.

At the same time, we think that in fairness the plaintiffs should be allowed to offer new case-in-chief evidence on damages on their Monroney Act and Law 77 label theory and should not be limited to the expert testimony and other evidence offered against Volvo and to cross-examination or refuting defendants' witnesses. And to the extent that the district court sitting as factfinder wishes to rely on evidence submitted in the Volvo trial, it may do so as long as the defendants are given an opportunity to recall witnesses or offer evidence on a damage-related issue on which the Volvo-trial evidence reasonably bears. This, after all, is a bench trial.

Trebol's Bankruptcy. The Trebol defendants (not the Gonzalezes) filed for bankruptcy on September 30, 1996, and argued to the district court that the judgment entered October 10, 1996, was subject to the automatic stay of 11 U.S.C. § 362(a)(1). The district court held that, since the entry of judgment after the Trebol defendants' bankruptcy filing was

purely "ministerial," the bankruptcy stay did not apply. Trebol appeals this ruling.

We recently set forth the characteristics that place action by a non- bankruptcy court within the automatic stay's narrow exception for "ministerial" actions. Generally, such actions are "essentially clerical in nature," such as the court clerk's docketing of a previously issued judicial disposition or similar act that does not require the exercise of an officer's discretion. See In re Soares, 107 F.3d 969, 974 (1st Cir.1997). We expressly noted that ministerial acts "can usefully be visualized as the antithesis of judicial acts." Id.

Here, the district court had not publicly announced its judgment or submitted its decision to the court clerk by the time the bankruptcy petition was filed on September 30, 1996. The district judge may well have made up his own mind as to how he would rule, but to be workable, an exception to the automatic bar for ministerial acts has to be based on objective considerations. Otherwise, the reviewing court would be inquiring into the unexpressed state of mind

of the trial judge, a course that would be unwise as well as impractical. We are not bound by the district court's own determination that entry of judgment after September 30 was ministerial. See Soares, 107 F.3d at 975.

Plaintiffs argue that objective evidence is provided by the district judge's statement at the August 29 hearing that the jury verdict against Volvo and the doctrine of consistency of judgments "affects" the judgment against the defaulting defendants. The statement mentioned came at the beginning of the hearing, before the defaulting defendants had been invited to present evidence or argue the issue of damages. We cannot treat this preliminary statement as a definitive decision on damages against Trebol, making everything that follows merely a ministerial act.

Consequently, the judgment as to Trebol was entered in violation of the stay. Although the automatic stay applies to appeals courts as well as district courts, we have by implication power to vacate a judgment entered in violation of the automatic stay. We therefore vacate the October 10

judgment against Trebol and direct that further proceedings against Trebol be halted until the stay is lifted.

Alternate Theory of Damages. The plaintiffs have filed a conditional appeal (No. 97-1145) addressing two issues, the first of which is directly relevant to the remand on damages. At trial, the district court instructed the jury that damages were to be calculated as the difference between the price paid by plaintiffs and the actual value of the cars received. The plaintiffs had requested a second theory that would have awarded the total amounts of money paid by plaintiffs as a result of the fraudulent transactions. The district court provisionally allowed this "full price" theory of damages in its order on bifurcation, but later rejected it during the trial against Volvo.

We think the district court was correct in denying recovery on the plaintiffs' alternate full price theory. The parties occasionally refer to the full price theory as a "rescission"-type remedy, seeking to place the plaintiffs in the same position that they would have been in absent the

fraudulent transaction. Such a theory may be an appropriate alternative where a fraudulent sale can be effectively undone. Cf. Randall v. Loftsgaarden, 478 U.S. 647, 661, 106 S.Ct. 3143, 92 L.Ed.2d 525 (1986); Winant v. Bostic, 5 F.3d 767, 776 (4th Cir.1993).

The theory is inappropriate here. Plaintiffs acquired their Volvo cars and have not offered to return them. Some still own their vehicles, and some have sold them for cash. Allowing plaintiffs to recover the full purchase price without requiring return of the vehicles would be an unjustifiable windfall. And putting aside the benefit plaintiffs obtained by using the cars over varying portions of the last decade, it would hardly be possible to return them now unblemished.

The cases cited by plaintiffs are not to the contrary. In Aetna Cas. Sur. Co. v. P & B Autobody, 43 F.3d 1546, 1569 (1st Cir.1994), the defrauded insurer was allowed to nullify all insurance coverage because of fraud--disallowing even valid claims--but there is no indication that the insurer did not also return the insurance premiums it had received.

Similarly, in FTC v. Figgie International, Inc., 994 F.2d 595, 606 (9th Cir.1993), cert. denied, 510 U.S. 1110, 114 S.Ct. 1051, 127 L.Ed.2d 373 (1994), the order for a full refund "create[d] no windfall" because plaintiffs who decided to keep the property they acquired due to the seller's fraud would forego the refund. We therefore need not decide the additional question mentioned in passing in DeMauro v. DeMauro, 115 F.3d 94, 98 (1st Cir.1997): whether an equitable remedy like rescission is at all cognizable under RICO.

Prejudgment Interest. The plaintiffs' second issue on cross-appeal concerns prejudgment interest. The district court did not submit the issue of prejudgment interest to the jury, but initially granted prejudgment interest on its own motion. It later reversed this decision, and plaintiffs now urge that, in the event that we remand this case for a new trial, the issue of prejudgment interest should be submitted to the jury. Notably, plaintiffs do not argue that the district

court abused its discretion in refusing to award prejudgment interest.

There will be no new trial against Volvo, for the reasons stated in our Volvo opinion. As to Trebol and the Gonzalez defendants, the case is being remanded only to determine the amount of damages. As we note above, because of the default the district court is not required to hold a jury trial on damages. We view it as unlikely that the district court will decide to impanel a second jury solely for the issue of damages.

We therefore leave for another day questions regarding the general availability of prejudgment interest in RICO cases, whether it should be left to a jury acting as factfinder, and whether prejudgment interest would be appropriate in this case. On remand, the district court is free to reconsider whether to grant prejudgment interest, a decision we will review if and when necessary, but there is no present reason for us to anticipate that the district judge will alter his position.

The district court's judgment entered on October 10, 1996, is vacated as to Trebol and the Gonzales defendants, and the matter is remanded for proceedings consistent with this opinion.

It is so ordered.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 97-1135

LUIS BONILLA, ET AL.,

Plaintiffs-Appellees,

VOLVO CAR CORPORATION,

Defendant-Appellant.

No. 97-1140

Luis BONILLA, ET AL.,

Plaintiffs-Appellees,

v.

TREBOL MOTORS CORPORATION, ET AL.,

Defendants-Appellees.

Ricardo González-Navarro and Conchita Navarro De Gonzalez,

Defendants-Appellants.

No. 97-1143

Luis BONILLA, ET AL.,

Plaintiffs-Appellees,

v.

TREBOL MOTORS CORPORATION, ET AL.,

Defendants-Appellants.

No. 97-1145

LUIS BONILLA, ET. AL.,

Plaintiffs-Appellants,

v.

TREBOL MOTORS CORPORATION, ET AL.,

Defendants-Appellees.

Before

Torruella, Chief Judge,[1]

Selya, Boudin, Stahl, Lynch and Lipez, Circuit Judges

ORDER OF COURT

Entered: October 7, 1998

The panel of judges that rendered the decision in these cases having voted to deny the petitions for rehearing and the suggestions for the holding of a rehearing en banc having been carefully considered by the judges of the Court in regular service and a majority of said judges not having voted to order that the appeals be heard or reheard by the Court en banc,

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[1]Judge Campbell did not participate in the decision of these cases.

[cc: Messrs. Mahony, Goldberg, Kanner and Rovell]

It is ordered that the petitions for rehearing and the suggestions for rehearing en banc be denied.

By the Court:

Phoebe D. Morse, Clerk

By: /s/
Chief Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

LUIS BONILLA, et al.	*	
	*	
Plaintiff	*	
	*	
vs.	*	CIVIL NO. 92-1795(JP)
	*	
TREBOL MOTORS	*	
CORPORATION, et al.	*	
	*	
Defendant	*	

ORDER

The Court has before it the motion of defendants Ricard Gonzalez Navarro and Conchita Navarro de Gonzalez ("Gonzalez codefendants") requesting the Court to vacate judgment and enter judgment in their favor (**docket No. 922**), and plaintiffs' response thereto. The Court hereby **DENIES** the Gonzalez codefendants' motion as well as the motion of Trebol Motors Corporation and Trebol Motors Distributor Corporation ("Trebol codefendants") adopting the Gonzalez codefendants' motion (**docket No. 921**).[1]

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[1]Trebol Motors Corporation and Trebol Motors Distributor Corporation ("Trebol codefendants"), in a motion styled "Motion Under Rule 59," adopted all arguments in this Motion to Vacate filed by the Gonzalez codefendants except those arguments pertaining to the Gonzalez codefendants' lack of an affirmative duty to disclose under the Act to Protect Motor Vehicle Buyers in

The Gonzalez motion regurgitates arguments made by other codefendants and the Gonzalez codefendants themselves in prior motions, all of which the Court has rejected. Therefore, the Court takes a somewhat summary approach to explaining its denial of the Gonzalez codefendants' motion in this Order.

First, the Gonzalez codefendants question whether this Court's October 7, 1996 Final Judgment is actually a final judgment under Rule 54(a). It is. It does not "contain a recital of the pleading, the report of a master, or the record of prior proceedings." It therefore meets the criteria of a final judgment under Federal Rule of Civil Procedure 54(a).

Next, in paragraphs two and three, the Gonzalez codefendants' motion attempts to discredit the complaint for not stating a claim and for not alleging more than one scheme. The Court finds these arguments questionable in

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Puerto Rico, 23 L.P.R.A. § 1201, and the Automobile Information Disclosure Act, 15 U.S.C.§ 1201. The Court has already addressed the other arguments in the Trebol's Motion Under Rule 59 in its Order of November 8, 1996. However, because the Trebol codefendants filed their Motion Under Rule 59 before the Gonzalez codefendants filed their Motion to Vacate, the Court could not address the part to the Trebol's motion adopting the Gonzalez codefendants' arguments. This order therefore addresses Trebol's Motion Under Rule 59, by reference, to the extent that motion adopted the arguments presented by the Gonzalez codefendants' motion now before the Court.

light of the Gonzalez codefendants' consent to the entry of default. Be that as it may, the Court finds that plaintiffs' complaint was sufficient - it stated a claim upon which relief could be and in fact was granted.

The Gonzalez codefendants' motion next alleges that the Court erred in denying Volvo Car Corporation's ("VVC") Motion for Summary Judgment and Motion for a Directed Verdict at the close of its case. Because the Gonzalez codefendants voluntarily consented to default in this case, they admitted each allegation in the plaintiffs' complaint, and waived the right to a jury trial. They forfeited any involvement in the trial with respect to liability. They have no standing to come before the Court now and object to the Court's denial of VCC's motions for summary judgment and directed verdict.

The Gonzalez codefendants further adopt VCC's and their own prior motions for a new trial. The present motion contributes no novel arguments or support for those earlier motions. Therefore, the Court reiterates its previous denials of those motions and the arguments upon which they were based.

In paragraph seven, the Gonzalez codefendants allege that "the Court erred both in refusing to dismiss the Monroney claims and in failing to determine, as a matter of law, that the Gonzalez codefendants do not have a statutory

duty to disclose pursuant to the Automobile Information Disclosure Act, 15 U.S.C. [§] 1231 et seq.. [sic]. and the Act to Protect Motor Vehicle Buyers in Puerto Rico, 23 L.P.R.A. § 1021 et seq. [sic]." Again, after waiving the right to a trial on liability, the Court finds that the Gonzalez codefendants' arguments cannot be well taken. It would be a travesty of justice for the Court, at this point, to even entertain the arguments presented by the Gonzalez codefendants regarding the Automobile Information Disclosure Act ("AIDA") and the Puerto Rico Act to Protect Motor Vehicle Buyers ("PRAPMV"). Furthermore, the Gonzalez codefendants cite no legal authority for their contentions that plaintiffs' claims under these acts should have been dismissed. The Court therefore denies the Gonzalez codefendants' arguments regarding the AIDA and PRAPMV.

In paragraphs seven, eight, and nine, the Gonzalez codefendants make several allegations of Court error with respect to evidentiary rulings made (or not made) by the Court during trial. The Court will not hear evidentiary objections from the Gonzalez codefendants, who waived their right to a trial and admitted liability.

The Gonzalez codefendants next argue that the Court denied them due process of the law. In particular, they (and the Trebol codefendants by reference) contend that the

Court violated its own Bifurcation Order when it heard evidence pertaining to damages during the liability phase of the trial. This, the argument continues, denied the defaulting codefendants their right to cross-examine witnesses and otherwise be involved in the trial as to damages. In support of their position, the defaulting codefendants have tendered the "unsworn declaration" of Salvador Antonetti, a member of Fiddler, Gonzalez & Rodriguez, the law firm that represented the Trebol codefendants in this matter. In his declaration, Mr. Antonetti describes a conversation that he had with Ms. Courtney Carroll, a lawyer working for the Court as a law clerk during the trial of this case.

The Trebol and Gonzalez codefendants' arguments both misrepresent the procedural history of this case leading up to and during trial and misunderstand the legal ramifications of entry of default, and Mr. Antonetti's statement is of no legal consequence. This Court did not violate the Bifurcation Order, and the defaulting codefendants were in no way denied due process of the law. At all times, the counsel for the defaulting codefendants were aware of the trial's progress and of what evidence was going to come out and in fact did come out during the liability phase. The defaulting codefendants did not attempt to officially appear during the damages phase of the bifurcated trial. Moreover, in order to provide the defaulting

codefendants the greatest opportunity within reason to be heard, the Court agreed to hold a hearing solely on the damages to be imposed on those codefendants. At the hearing, those codefendants offered no evidence and made no other efforts to convince the Court that the evidence that was presented during the trial against Volvo was not correct or applicable to them. As a consequence of their voluntary consent to the entry of default, these codefendants had limited rights to be involved in the trying of this case. The Court offered them, at the very least, that process to which they were entitled. These conclusions will be addressed in turn.

First, the Court did not violate the Bifurcation Order. The defaulting codefendants do not clearly explain how or when the Court violated its Bifurcation Order. Instead, they simply conclude that the Court "violat[ed] in mid-trial the court's order of Bifurcation and provid[ed] no notice to the Gonzalez defendants that liability and damages would be tried together." This is simply incorrect. The cause of action under which the plaintiffs brought their claim is of such a nature that in order to establish liability, they were required to prove substantial injury. The Trebol and Gonzalez codefendants' attorney were well aware of this aspect of the liability phase of the trial. They were present when the Court ordered bifurcation, at which time the

necessity of proving damages in order to establish liability was discussed. They could never have reasonably assumed that no evidence on damages would be presented during the liability phase of the trial.

Second, whatever the Court's conduct during the liability phase of the trial, the attorneys for the Trebol and Gonzalez codefendants knew of that conduct and never raised any objections. They were present (albeit in the gallery) at various times throughout the liability phase of the trial and knew how the trial was proceeding. Moreover, one witness, Basilio Velez, who testified during the phase of the trial on behalf of VCC was an executive employee of Trebol. During the trial he was managing the Trebol businesses, because the Gonzalez codefendants were not in Puerto Rico. Now, after a lengthy trial, which included both liability and damages phases, and a hearing on damages against the defaulting codefendants, those defaulting codefendants cannot come before the Court and complain that the Court violated its Bifurcation Order, when they were aware all along how the trial was proceeding and never attempted to raise any resistance.

Third, the defaulting codefendants' reliance on the unsworn statement of Salvador Antonetti, one of Trebol Motors' attorneys, is misplaced. In that declaration, Mr. Antonetti alleges that Courtney Carroll, a law clerk working

in this Court's chambers during trial, informed him that the defaulting codefendants' attorneys "were excused." This conversation took place after the Court, as its first order of business, accepted his client's notice of default on the first day of trial, prior to jury selection. Neither the Gonzalez Motion to Vacate nor the Trebol Motion Under Rule 59 (the motions to which Mr. Antonetti's statement was attached) explain the import they intend the Court to attach to his statement. It is not the task of the Court to draw inference from obscure submissions. Furthermore, as an initial matter, Mr. Antonetti's statement is too vague to serve as the basis for any implication.[2] It does not explain the context of Ms.

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[2] Mr. Antonetti's statement reads as follows:

"4. On June 24, 1996, I was present in the courtroom on behalf of the Trebol defendants when this case was called for jury trial on liability, pursuant to the bifurcation order of the Court dated April 16, 1996.

5. As the first order of business that day, the Court read a ruling disposing of certain motions filed by Volvo Car Corporation and accepting the notice of default filed by the Trebol and Gonzalez defendants.

6. After issuing its rulings, the Court declared a recess, the record was closed and the presiding judge, Hon. Jaime Pieras, Jr., Senior U.S. District Court Judge, descended from the bench towards chambers, with other court personnel.

7. At that point, I asked the law clerk assisting the presiding judge, Ms. Courtney Carroll, before she entered chambers, that she inquire of the Court whether the

Carroll's statement. Nor can we infer from Mr. Antonetti's statement that Ms. Carroll excused counsel from any more than the remainder of the first day of trial. The Court cannot even infer that Ms. Carroll had any idea what Mr. Antonetti was asking to be excused from.

More importantly, even if the Court were to endow from Mr. Antonetti's statement with some inferential import, that statement is of no legal significance. If Mr. Antonetti had wished this non-judicial conversation with the Court's law clerk to carry legal significance regarding his representation of his client in the damages phase of trial, he could have so requested by formal motion or in open court on the record so that his intentions were manifest and indisputable. In that motion or elocution, he would have had to explain the full meaning he ascribed to each statement in the conversation so the plaintiffs and codefendants could take a position and the Court could address a formal order resolving the matter. Because he failed to do so, the Court can not confer any legal consequence on his unsworn declaration. To do so would be tantamount to imbuing

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attorneys for the Trebol and Gonzalez defendants could be excused.

8. Ms. Carroll entered chambers and almost immediately returned to the courtroom and responded to my question by stating that the attorneys were excused."

something completely outside of the judicial process with indicia of legitimacy. If the Court were to thus stamp Mr. Antonetti's statement with legal imprimatur, there would be no need for courtrooms.

Finally, with respect to Mr. Antonetti's declaration, Ms. Carroll, as a law clerk, cannot bind the Court, and her statements are not those of the Court. See Environmenta Defense Fund, Inc. v. Alexander, 614 F.2d 474, 480 (5th Cir. 1980)[3] Any reliance on Ms. Carroll's statements, made in response to a vague question, as a reason to remain absent from trial proceedings would be unreasonable and of no validity. Moreover, Trebol and Gonzalez codefendants did not so rely - they were well aware of what was going on at trial, as discussed above.

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[3] ". . . one of plaintiff's counsel asserts that he spoke to one of the judge's law clerks who told counsel that the judge did not plan to take evidence on any issue but the authorization for the project at the hearing and that all other issues including affirmative defenses would be heard later. We repeat the argument in order to give it express condemnation: courts speak to litigants by orders or minute entries or judgments or, on occasion, at conference in chambers. Ex parte communications with judges are generally disfavored. code of Judicial Conduct for United States Judges, Canon 3A(4). A fortiori, neither ex parte communication with a judge's law clerk nor reliance upon such communication can be condoned."

Nevertheless, in order to allay any suspicion regarding the events brought into question by Mr. Antonetti's statement, the Court will recount its recollection of those incidents. The Court told Ms. Carroll that Mr. Antonetti consented to entry of default: what he does after now is his decision, so if he wishes to leave, let him. The Court certainly did not excuse him from attending any phase of the trial. It is common knowledge that in the vast majority of cases, defaulting defendants do not attend the hearing on damages. In this case, the decision to consent to the entry of default my have benefitted all defendants. Likewise, any decision by the defaulting codefendants to attend or not attend a particular phase of the trial amounted to a tactical decision within the province of defense counsels' professional judgment. Furthermore, the law does not impose upon a defaulting defendant the obligation to further attend the trial or a hearing on damages. Consequently, the Court could not "excuse" the defendants from doing that which they were not obligated to do. The allegations concerning Mr. Antonetti's conversation with this Court's law clerk are therefore immaterial, another reason the Court will not consider them.

Fourth, and perhaps most importantly, the Court reiterates the theme of its October 7, 1996 Opinion and Order addressing the damages to be assessed against the

defaulting codefendants, and reminds them that they are just that - defaulting codefendants. As the Court stated at the hearing on damages, when the Trebol and Gonzalez codefendants entered default, they "accepte[d] . . . liability as to the allegations [made in the plaintiffs'] complaint." Tr. Hr'g on Damages, at 4, (August 29, 1996) (citing Goldman, Antonetti Farraiuoli, Axtmayer & Hertell v. Medfit Intern., Inc., 982 F.2d 686, 693 (1st Cir. 1992)). The defaulting codefendants waived their right to a trial and accepted liability. Goldman, Antonetti, at 692 n.15 (quoting Adriana Int'l Corp. v. Thoeren, 913 F.2d 1406, 1414 (9th Cir. 1990), cert. denied 111 S. Ct. 1019, 112 L.Ed2d 1100 (1991)). Where the Court has a defaulting codefendant and a non-defaulting codefendant in a case of joint liability, it can determine damages against the defaulting codefendant after the liability of the non-defaulting party has been determined. Dundee Cement Co. v. Howard Pipe & Concrete Prod., 722 F.2d 1319, 1324 (7th Cir. 1983) (interpreting In re Uranium Antitrust Litigation, 617 F.2d 1248 (7th Cir. 1980)). In making that determination of the amount of damages to assess against defaulting defendants, the Court has considerable latitude. Tr. Hr'g on Damages, at 5 (August 29, 1996); Jones v. Winnespesaukee Realty, 990 F.2d 1, 4 (1st Cir. 1993). As stated in Fed. R. Civ. P. 55(b),

> "[i]f, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute of the United States."

"The rule itself establishes that the hearing to be held falls within the discretion of the trial court." Tr. Hr'g-on Damages, at 5. In this case, after Volvo's trial, the Court had before it ample evidence from which to determine damages. During a five week trial in which the parties presented more than 21 witnesses and 337 exhibits, the jury was equipped to determine damages. The Court found their determination to be fair, and felt confident in applying the same damages figure to the defaulting codefendants. As stated above, the Court has wide latitude in demarcating and conducting that fact-finding it deems necessary to accurately determine the amount of damages to assess against a defaulting defendant. In some cases this may require a separate hearing; but where a full-blown trial was already held with respect to a non-defaulting codefendant whose

interests parallel those of the defaulting codefendants[4], a Court will often not need a hearing to reliably determine damages. In such cases, the Court does not violate the due process rights of defaulting codefendants by assessing damages using the evidence adduced at trial. However, in order to give the defaulting codefendants every opportunity to protect their rights, the Court did grant a separate hearing on damages pertaining specifically to the Trebol and Gonzalez codefendants. Thus, the defaulting codefendants were given, at the very least, the full measure of process due them.

Fifth, the Court would note that, given an opportunity to exercise some influence on the outcome of this case, the defaulting codefendants refused to meaningfully participate. As discussed above, the Court granted the defaulting codefendants a hearing on damages, at which they were given a chance to present evidence or objections to the damage award as determined by the jury in

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[4]During trial, counsel for Volvo competently represented the interests of all codefendants. Particularly with respect to damages. Volvo's goals were identical and never in conflict with the interests of the defaulting codefendants. Volvo presented the same witnesses that the defaulting codefendants would have presented, and counsel for Volvo ably cross-examined all of the plaintiffs' witnesses. Therefore, the concerns of the defaulting codefendants in the determination of damages at trial were adequately protected.

the trial against Volvo. At that hearing, the Court declared its intention to apply the jury's damage award to all codefendants, jointly and severally. After the Court declared its intention, counsel for the plaintiffs made their arguments. When the plaintiffs rested, counsel for the Trebol and Gonzalez codefendants were given a turn to state their case. They presented no evidence and did not attempt to discredit any of the evidence that came before the Court during trial. Instead, counsel for the Trebol and Gonzalez codefendants first objected to the use of the trial evidence on due process grounds, maintaining that they were denied the right to cross-examine, and then moved for judgment under Rule 50 of Federal Rules of Civil Procedure. Instead of using the hearing to object on due process grounds, the defaulting codefendants should have accepted the hearing as the process to which they were entitled and with which they were provided, and attempted to make their arguments regarding damages.

This motion, like much of the defendants' post-trial argumentation in this case, has distorted the true character of this case. The reality of the situation can be gleaned from close scrutiny of the facts surrounding the case. The Trebol and Gonzalez codefendants vigorously contested this case for several years, expending enormous sums of money in the process. Yet, on the eve of trial they informed the Court

that they no longer wished to defend, and instead, they consented to entry of default, and allowed VCC to defend alone. Now VCC's case having been unsuccessful, those same codefendants attempt, post-trial, to do what they waived their right to do during trial.

IT IS SO ORDERED.

In San Juan, Puerto Rico, this 6th day of December, 1996.

/s/
JAIME PIERAS, JR.
U.S. DISTRICT JUDGE

IN THE UNITED STATE DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

LUIS BONILLA, et al.	*	
	*	
Plaintiff	*	
	*	
vs.	*	CIVIL NO. 92-1795 (JP)
	*	
TREBOL MOTORS CORPORATION, et al.,	*	
	*	
Defendant	*	

FINAL JUDGMENT

On August 2, 1996, this Court entered JUDGMENT for plaintiffs to have and recover from defendant Volvo Car Corporation ("Volvo") the amount of $129,591,300.00, plus costs and attorneys' fees, pursuant to 18 U.S.C. § 1964(c). This Court denied plaintiffs' motion to amend the judgment against Volvo to include an amount of prejudgment interest. Moreover, this Court has determined the amount of damages against Trebol Motors Corporation and Trebol Motors Distributor Corporation ("Trebol") and Ricardo Gonzalez and Conchita Navarro de Gonzalez ("Gonzalez codefendants"), to be $129,591,300.00, plus costs and attorneys' fees. All codefendants (Volvo, Trebol[1] and Gonzalez) are individually

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[1]The Court is aware that Trebol codefendants filed for bankruptcy on Friday, September 27, 1996, and that 11 U.S.C. § 662(a)(1) automatically stays "the commencement or

liable for the entire amount of the judgment, $129,591,300, jointly and severally. Currently pending are plaintiffs'

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continuation of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case." However, where the mere entry of judgment constitutes but a ministerial task, the actual decision underlying the judgment having been made prior to the bankruptcy filing, it need not be stayed. Rexnold Holdings, Inc. v. Biderman, 21 F.3d 522, 527 (2nd Cir. 1994); Teachers Ins. & Annuity Ass'n v. Butler, 58 B.R. 1019 (Bankr. S.D.N.Y. 1986); c.f. Savers Fed. Sav. & Loan Assoc. v. McCarthy Constr. Co., 884 F.2d 145 (4th Cir. 1989) (arbitration awards may be approved under the automatic stay if the decision, "in word and deed" was rendered before the bankruptcy petition was filed); but c.f. Constitution Bank v. Tubbs, 68 F.3d 685 (3d Cir. 1995). The decision underlying this judgment had been made long before September 27, but several factors conspired to render the actual filing of this judgment impossible until now. First, the Court prepared a lengthy Opinion and Order explaining its reasoning. Second, the law clerk who had been working on the case and who was familiar with it, completed her clerkship on September 25, whereupon she departed for South America and has not been available. Finally, the Court has been in Massachusetts since September 19, to attend a workshop of the judicial conference of the First Circuit, for medical treatment, and for other personal matters, and has been unable to sign this document until arriving in Washington, D.C. on October 7, 1996. Since a time prior to September 27, however, only ministerial tasks have been required to effectuate this judgment, as is evidenced by the transfer memo written by the departing clerk to her replacement. Therefore, the Court finds that the automatic stay of section 362(a)(1) does not bar entry of this judgment, which was a fait accompli before Trebol codefendants' bankruptcy filing.

post-judgment motions for attorneys' fees and costs against all codefendants. Pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, this Court finds that there is no just reason for delay, and this is the entry of final judgment.

IT IS SO ORDERED.

In San Juan, Puerto Rico, this 8th day of 1996

/s/
Jaime Pieras, Jr.
U.S. DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

LUIS BONILLA, et al.	*	
	*	
Plaintiff	*	
	*	
vs.	*	CIVIL NO. 92-1795 (JP)
	*	
TREBOL MOTORS CORPORATION, et al.	*	
	*	
Defendant	*	
	*	

OPINION AND ORDER ON MOTION FOR NEW TRIAL

The Court has before it defendant Volvo Car Corporation's post-verdict motion for judgment as a matter of law, for a new trial, or in the alternative, for remittitur, and plaintiffs' opposition (docket Nos. 819 and 869). For the following reasons, defendant's motion is hereby DENIED.

I. INTRODUCTION

This is a class action alleging violations of the Organized Crime Control Act known as Racketeer Influenced and Corrupt Organizations ("RICO"), 18 U.S.C. § 1962, et seq. Plaintiffs are approximately 9,000 Puerto Rican consumers who purchased Volvo vehicles of the 200 series from defendants during a ten year period. Defendants are Volvo Car Corporation ("Volvo"), the foreign manufacturer of the vehicles, Trebol Motors Corporation and Trebol Motors Distributor Corporation

("Trebol"), the entities which imported and distributed the Volvo vehicles to the consumers in Puerto Rico, and Ricardo Gonzalez and Conchita Navarro de Gonzalez ("Gonzalez codefendants"), the principals of Trebol.

Plaintiffs alleged that all defendants engaged in an elaborate scheme to defraud consumers of Volvo vehicles of the 200 series in Puerto Rico, from 1983 to 1993, which used the mails and wires, in violation of 18 U.S.C. §§ 1962 (a), (c), and (d). After four years of contentious pretrial, on the Friday afternoon prior to the start of trial on Monday, June 24, 1996, the Trebol and Gonzalez codefendants consented to the entry of default and notified that they would not appear at trial to defend themselves. This Court denied Volvo's motion for a continuance or a severance, and proceeded as scheduled with the bifurcated trial against Volvo as the sole defendant.

On July 25, 1996, the jury returned a verdict in the form of special interrogatories finding that there were two RICO "enterprises": the first one was comprised solely of Trebol Motors Distributors Corporation, and the second enterprise was comprised of Trebol Motors Distributor Corporation, Trebol Motors Corporation, Ricardo Gonzalez, Conchita Navarro de Gonzalez and Volvo. Next, the jury found that Volvo intentionally engaged in a pattern of racketeering activity through mail or wire fraud in violation of 18 U.S.C. § 1962 (c) and conspired with Trebol to engage in the scheme to defraud,

in violation of 18 U.S.C. § 1962(d) which caused injury to plaintiffs' business or property. Furthermore, the jury found that Volvo had derived income from the pattern of racketeering activity and invested that income in the furtherance of the enterprise in violation of 18 U.S.C. § 1962(a). Nevertheless, the jury found that plaintiffs had not experienced any injury to their business or property as a result of this violation.

On July 30, 1996, the jury awarded plaintiffs an aggregate amount of $43,197,100/00, which this Court trebled pursuant to 18 U.S.C. § 1964(c). Thereafter, this Court entered judgment against defendant Volvo in the amount of $129,591,300.00 plus costs and attorneys' fees.

Volvo has filed an omnibus post-trial motion raising a host of issues, and requesting that the judgment be set aside and that as a matter of law judgment be entered in favor of Volvo, or that this Court grant a new trial, or in the alternative, they requested a remittitur. After due consideration of Volvo's arguments, the motion for new trial is hereby **DENIED**.

II. STANDARD FOR A MOTION FOR A NEW TRIAL

Rule 59 of the Federal Rules of Civil Procedure broadly permits a trial court to order a new trial, based upon the motion of a party or upon the Court's own initiative, "for any of the reasons for which new trials have heretofore been granted". Fed. R. Civ. P. 59(a). Some of the reasons for which new trials have been granted include claims that "the verdict is against the

weight of the evidence, that the damages are excessive, or that, for other reasons, the trial was not fair to the party moving; and may raise questions of law arising out of alleged substantial errors in admission or rejection of evidence or instructions to the jury," Cigna Fire Underwriters v. MacDonald & Johnson, 86 F.2d 1260, 1262-63 (1st Cir. 1996) (citing Montgomery Ward & Co. v. Duncan, 311 U.S. 243, 251 (1940)).

The decision whether to grant a motion for a new trial lies within the discretion of the trial court. Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. 33, 36 (1980). However, trial courts shall exercise their discretion in favor of granting a new trial sparingly since "a jury's verdict on the facts should only be overturned in the most compelling circumstances." Wells Real Estate, Inc. v Greater Lowell Board of Realtors, 850 F.2d 803, 811 (1st Cir.), cert. denied, 488 U.S. 955 (1988).

Even if the trial court could have reached a verdict opposite from the jury, the court shall not upset a jury verdict which is based on the evidence presented at trial. Velaquez v. Figueroa-Gomez, 996 F.2d 425, 428 (1st Cir.), cert. denied, 510 U.S. 993 (1993). A trial court shall order a new trial "only if the verdict, though rationally based on the evidence, 'was so clearly against the weight of the evidence as to amount to a manifest miscarriage of justice,'" Fernandez v. Corporacion Insular de Seguros, 79 F.3d 207, 211 (1st Cir. 1996) (citation omitted).

III. DISCUSSION

A. WEIGHT OF EVIDENCE

Volvo argues that the verdict is not supported by the weight of the evidence as it relates both to the issue of proximate cause and damages. Volvo contends that there is no evidence that the elements of fraud underlying the allegations of Volvo's violations of RICO activity caused plaintiffs' injuries. Moreover, Volvo argues that the measurement of damages as the difference between the purchase price of the class vehicles and the value of the class vehicles, or the price differential, is incorrect.

Evidence was presented at trial that Trebol codefendants are the sole importer and distributor of Volvo vehicles on the island of Puerto Rico. The partnership between Volvo Car Corporation and Trebol extended beyond a mere contractual relationship. In addition to selling Trebol the Volvo vehicles, Volvo provided Trebol with assistance in advertising the vehicles, training for personnel, and financial assistance in certain instances. Representatives of Volvo visited Trebol's business facilities in Puerto Rico, several times a year, and representatives of Trebol traveled to Sweden or Spain for meetings with Volvo. In between the personal meetings between representatives of the two entities, representatives of Volvo and Trebol communicated with each other continuously over the telephone and fax. During the relevant time period,

sales of Volvo vehicles in Puerto Rico exceeded approximately $600 million. A Volvo representative testified that the success of Trebol was Volvo's best guarantee of its own prosperity.

Five aspects of the partnership between Volvo and Trebol in the sale of vehicles in Puerto Rico form the foundation of plaintiffs' allegations that Volvo engaged in a scheme to defraud consumers of 200 series vehicles. First, Trebol changed the emblems of approximately twenty percent (20%) of the class vehicles from the DL to the GLE emblem with Volvo's authorization and approval. The GLE emblem identifies the model as the one with the highest level of specification or luxury at any given time. Trebol ordered the vehicles through the use of a variant code which identified all the vehicles as either GL or DL models. The standards and specifications of the different models varied for each year, and varied within the year. Once the vehicles arrived in Puerto Rico, Trebol modified the vehicles by adding "port additions," and replaced the DL emblem already attached to the automobile with a GLE emblem. In certain instances, the vehicles sold with the GLE emblem included power package, 15 inch wheels, metallic paint and leather seats, which were not included in the DL models. However, in other instances, the only difference between a GLE and a DL model was the set of 15 inch wheels. Nevertheless, the purchase price of the GLE model was substantially higher than that of a DL model.

Second, federal and Commonwealth automobile disclosure statutes, the Monroney Act, 15 U.S.C. § 1231 et seq., and Law 77, 23 L.P.R.A. § 1021, et seq. respectively, require the manufacturers and dealers to affix stickers to windows of new automobiles. The federal statute requires the manufactures to disclose relevant information including the make, model, serial or identification numbers of the vehicle, the final assembling point, the retail delivered price for each accessory, and the retail price of such automobile suggested by the manufacturer. The commonwealth statute requires automobile dealers to place a sticker on the window of new cars disclosing the make and model of the vehicle and the factory cost of the vehicle. The stickers of the plaintiffs' vehicles did not itemize the options and accessories for each vehicle or model and the corresponding costs. The MSRP was established by Trebol, not Volvo, as one global price for the vehicle which included all options and accessories for that particular vehicle.

Third, Volvo used a unique billing system for Puerto Rico by sending one invoice per vehicle to Trebol in Puerto Rico which reflected one Free on Board ("FOB") price, and sent a copy of the same invoice to Auto Und Motoren ("AUM") in Liechtenstein. Thereafter, AUM sent a second invoice to Trebol which reflected an inflated FOB price. The vehicles never traveled to Liechtenstein, nor did AUM perform any manufacturing activities on the vehicles. Defendants asserted

that AUM was the financial guarantor for the sale of the Volvo vehicles to Trebol, however, Volvo provided a $3 million dollar loan, or guarantee to AUM. Plaintiffs' expert testified that AUM served no legitimate business purpose.

Fourth, Volvo sent certifications of the weight and horsepower of the various vehicles Trebol to be forwarded to the Department of the Treasury for the Commonwealth of Puerto Rico ("Treasury") for the calculations of the excise taxes. Pursuant to Trebol's request, Volvo calculated the horsepower pursuant to a formula which had been disclaimed by the automobile industry, and replaced by a new formula. Because of the use of this formula, the excise tax on the vehicles was calculated at 107 horsepower and the corresponding 19 percent excise tax, instead of 114 horsepower at 30 percent tax. Nevertheless, Trebol used the measurement of the higher horsepower calculated by the formula accepted by the automotive industry provided to the consumer and to other governmental entities for other purposes. There was no law or regulation requiring Volvo to use the new formula until 1989, and the certifications specified the formula which Volvo used to calculate the horsepower. Nevertheless, a former employee of the Treasury testified that due to the number and complexity of the information processed at Treasury, employees relied upon the good faith of the manufactures to voluntarily comply with

industry standards for the preparation of horsepower certifications.

Representatives from Volvo testified that a factor in the success of Trebol, and consequently the success of Volvo, was the strength of the competition. Several witnesses testified that the other vehicles from the European market, such as BMW and Audi did not present any competition to Volvo during this time period. A factor in Trebol's success included their ability to avoid excise taxes. In a letter, Volvo discussed with Trebol the hidden potential from tax savings.

Fifth, on the issue of overpricing, representatives from Volvo testified that Volvo considered a variety of factors when establishing the sale price of the vehicles to Trebol, including the retail price which Trebol would charge to consumers was the amount that the customer was willing to pay. Furthermore, representative from Volvo testified that a customer's willingness to pay depended upon the information which the consumer had been provided concerning the vehicle. Named plaintiffs testified that they did not have complete information concerning the vehicles which they had purchased, and that if they had obtained such information prior to their purchase, they would not have purchased the vehicles they did at the purchase price which they paid.

Volvo in its defense presented evidence that as an international corporation manufacturing a quality car in Sweden,

and selling cars throughout the would, it engaged in the business practice of choosing one sole importer per market in order to ensure the best quality of service to the consumer. In Puerto Rico, Volvo had chosen Trebol as the importer. Volvo denied that any aspect of its business practice with Trebol constituted a scheme to defraud. Furthermore, Volvo argued that Trebol was the taxpayer in Puerto Rico; that Trebol was responsible for affixing the stickers to the window of the vehicles; and that Trebol engaged in the business relationship with AUM. Thus, Volvo should not be held liable for Trebol's activities. Volvo representatives testified that they were unaware of several of Trebol's actions. Finally, Volvo represented an expert witness who testified that plaintiffs had not overpaid for the value of their vehicles.

Based on the conflicting evidence, the jury determined that certain witnesses were more credible than others, and accorded more weight to certain testimony. Since the jurors are the ultimate triers of fact, the trial court shall be especially reluctant to order a new trial when the verdict rested upon the jury's determination of the credibility of witnesses. Rios v. Empresa Lineas Maritimas Argentinas, 575 F.2d 986, 990 (1st Cir. 1988). The jury's verdict determining that Volvo had engaged in a scheme to defraud using the mails and wires, and that plaintiffs were injured as a result of this scheme is well supported by the evidence.

1. Proximate Cause

Volvo attacks each separate element of the allegations underlying the scheme to defraud. First, Volvo argues that as a matter of law, the federal automobile disclosures statute does not apply to a foreign manufacturer of vehicles, and therefore, admission of evidence concerning the compliance of the stickers with the disclosure statutes constituted prejudicial error.

Plaintiffs in the case at bar, however, alleged that Volvo had engaged in a scheme to defraud using the mails and wires in violation of RICO. This case did not involve a cause of action for violation of the Monroney Act. "The [mail fraud] statute does not merely forbid the use of the mails to perpetrate an act made criminal by state or federal law; it reaches any plan, consummated by the use of the mails, in which artifice or deceit is employed to obtain something of value with the intention of depriving the owner of this property," U.S. v. Kreimer, 609 F.2d 126, 128 (5th Cir. 1980). Therefore, whether the stickers violated the disclosure statues is not dispositive of the question of whether Volvo engaged in a scheme to defraud consumers of Volvo vehicles. Evidence of the existence of these statutes, and evidence of whether the stickers complied with the statutes was relevant and admissible to the question of whether Volvo was using artifice or deceit to obtain a higher purchase price with the intention of depriving plaintiffs of their money.

Likewise, each other aspect of the scheme to defraud was not essential to prove that Volvo engaged in a scheme to defraud with Trebol, yet all of those elements form the foundation of plaintiffs' allegations. Cumulative evidence might prove what one piece of evidence in isolation does not prove. U.S. v. Sawyer, 85 F.3d 713, 734 (1st Cir. 1996) (citing U.S. v. Ortiz, 966 F.2d 707, 711 (1st Cir. 1992)). Therefore, the weakness of any one aspect of the scheme does not detract from the quantity of evidence as to the whole scheme. "[T]he scheme is not to be measured by technicalities," U.S. v. Lindsey, 736 F.2d 433, 436 (7th Cir. 1984). Nor does the fact that Trebol might have been the primary actor detract from the fact that plaintiffs alleged that Volvo conspired with Trebol to engage in the scheme to defraud. A "conspirator is responsible for offenses committed by his fellow conspirators," Brunswick Corp. v. E.A. Doyle Mfg. Co., 770 F. Supp. 1351, 1372 (E.D. Wis. 1991) (citations omitted). The totality of evidence presented at trial was sufficient for the jury to conclude that Volvo engaged in a scheme to defraud, and conspired with Trebol to engage in the scheme to defraud consumers of Volvo vehicles in Puerto Rico, in violation of RICO. Moreover, the evidence is sufficient to sustain the jury's verdict that plaintiffs' injuries were caused by Volvo's participation in the RICO enterprise's affairs through a pattern of racketeering activity, in violation of § 1962(c), and conspiracy with Trebol, in violation

of §1962(d). Sedima v. Imrex Co., Inc., 473 U.S. 479, 496 (1985).

2. Damages

Volvo next argues that even assuming that plaintiffs suffered injury, plaintiffs' expert witness's calculation of the difference between the purchase price of the vehicles and their respective value is an improper measure of damages. "With respect to the issue of how accurately damages must be measured, 'there is a clear distinction between the [relatively high] measure of proof necessary to establish that [a plaintiff] has sustained some damage and the [relatively low] measure of proof necessary to enable the jury to fix the amount," Coastal Fuels of P.R. v. Caribbean Petroleum, 79 F.3d 182, 200 (1st Cir. 1996) (citing Stony Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 562 (1931)). The evidence presented in the case at bar was a sufficient measure of proof to allow the jury to adequately fix the amount of damages.

Plaintiffs' expert witness, Dr. Lewis Koppel, performed an analysis of the difference between the purchase price plaintiffs paid for their vehicles, set off by the value of the vehicle. Koppel began his calculation by taking the list price of a comparable vehicle being sold in the southeastern United States as a benchmark for determination of the fair market value of plaintiffs' vehicles, and increasing that amount by the value of the options and accessories added to plaintiffs' vehicles. The

use of the list price of Volvo vehicles being sold in Florida was an appropriate approximation of the value of the class vehicles. The specifications of the vehicles sent from Volvo to Trebol in Puerto Rico were exactly the same as the specifications of the vehicles sent from Volvo to the southeastern Untied States, and the variant codes for the 200 series vehicles from which the US importer and the Puerto Rican importer would order from Volvo in Sweden were exactly the same.

Volvo disputes Koppel's qualifications as an expert witness and claims that his methodology was flawed. These arguments, however, were presented to the jury since they reflect on the credibility, not the admissibility, of Koppel's testimony. Koppel had calculated the aggregate amount of plaintiffs' damages at $63,584,000.00. That figure constituted the "upper edge of the universe of sustainable awards," Dopp v. Pritzker, 38 F.3d 1239, 1249 (1st Cir. 1994). On cross-examination Koppel testified that he had not taken into consideration the difference between the applicable excise taxes in Puerto Rico and Florida. Furthermore, Koppel agreed that if he had calculated the difference in the applicable excise taxes at approximately $3,000.00 per vehicle, his original calculation would have overestimated the aggregate amount of damages by approximately $27 million. Therefore, the jury's reduction of plaintiffs' expert witnesses' calculations by approximately $20 million, and final award of approximately $43 million is a

reasonable assessment of the amount of damages suffered by plaintiffs, and based upon an adequate evidentiary predicate. Consequently, the jury verdict is not an example of impermissible resort to speculation and surmise. Id. at 1250.

B. ISSUES REGARDING ADMISSION AND EXCLUSION OF EVIDENCE

Rule 611 of the Federal Rules of Evidence provides in pertinent part:

> The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, . . .

It is well settled that the admission and exclusion of evidence is primarily within the discretion of the trial judge. Blinzler v. Marriott Intern., Inc., 81 F.3d 1148, 1158 (1st Cir. 1996).

1. Demonstrative Evidence

Volvo contends that this Court erred in precluding the admission of two pieces of demonstrative evidence: a Volvo vehicle model, and a display of genuine Volvo parts for the years between 1984 and 1993.

On July 19, 1996, following the testimony of Basilio Velez, the comptroller of Trebol, Volvo proposed to take the jury on a field trip to perform a visual inspection of a Volvo vehicle. This "mock up" Volvo vehicle was not an actual

automobile that a customer, especially any plaintiff, could have ever purchased from any of defendants. Volvo had created this mock up for purposes of this litigation by combining parts and accessories from various models available over the various years. This multi-color, multi-texture paint, multi-option and multi-accessory hypothetical model demonstrated the potential varieties of hypothetical vehicles over the relevant time period, but was irrelevant to the question of whether or not Volvo engaged in a scheme to defraud using the mails and wires. The model was unreliable, and it would confuse the jury rather than serve to clarify salient facts. Moreover, the field trip to view the mock up would have been a needless consumption to time, and would not have served to ascertain the truth.

Likewise, presentation of the displays of the genuine Volvo parts and accessories which were added to plaintiffs' vehicles would have needlessly consumed time. There was no dispute in the case at bar that the options and accessories which were installed in the factory or by Trebol in Puerto Rico were genuine Volvo equipment.

2. Basilio Velez's Testimony

Prior to the testimony of Basilio Velez, the comptroller of Trebol, this Court ruled that Velez would be allowed to testify as to matters within his personal knowledge. Velez would be prohibited, however, from testifying about matters beyond the scope of his employment at Trebol. Rule 602 of the Federal

Rules of Evidence provides that "a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge to the matter."

During direct examination, Velez testified about how Volvo vehicles arrived in the port in Puerto Rico and which port additions were installed on the vehicle of the class members during the relevant time period. Nevertheless, this Court did not allow Velez to testify about the decision to order one model (DL) as opposed to another (GL) and then to add port additions, the decision on what retail price to charge consumers, decisions about what information was included on the stickers, and an alleged audit concerning the stickers. Volvo contends that the Court's ruling precluding this testimony was erroneous.

As comptroller of Trebol, Velez was in charge of bookkeeping functions. Velez did not participate in making executive decisions. Therefore, the testimony concerning the other issues is beyond the scope of his personal knowledge, and consequently inadmissible.

3. Joey Fuentes' Testimony

Volvo has stated several objections in relation to the testimony of plaintiffs' expert witness, Joey Fuentes. Plaintiffs had proposed calling Fuentes as an expert in accounting, and as an expert on the applicability and compliance of the automobile disclosure laws. Nevertheless, at trial, this Court only qualified Fuentes as an expert in accounting, and not on the subject of

automobile disclosure laws. Fuentes testified on a limited basis about the stickers since he had studied these stickers in preparing his opinion on the issue of the amount by which each individual plaintiff had been overcharged. Therefore, Fuentes did not testify as an expert on automobile disclosure statutes, and there was no error in the admission of his testimony.

4. Evidence Which Had Not Been Premarked

Volvo contends that the Court erroneously admitted certain pieces of evidence which had not been properly marked for identification purposes during the pretrial, marking procedure. Volvo's contention is mistaken. This Court admitted into evidence portions of a document which had been premarked in its entirety. The premarking of the entire document was sufficient to place Volvo on notice that plaintiffs would seek to introduce into evidence a smaller subset of any entire premarked document. As to a second group of documents, the Court initially admitted several documents into evidence which had not been premarked, then later struck those exhibits from evidence. Therefore, Volvo's argument if directed as documents which were admitted but later stricken from evidence is meritless.

5. Document Depository

At the onset of trial, Volvo raised an objection to the authenticity of a document being introduced into evidence by plaintiffs. In response, this Court ruled that any document

which was one of Trebol's business records, which had been produced to plaintiffs by Trebol or Gonzalez codefendants during discovery, and which had been stored in a document depository created specifically for this litigation was presumptively authentic. See U.S. v. Goichman, 547 F.2d 778, 783 (3rd Cir. 1976) (once a movant has made a prima facie case to the court of the authenticity of a document, the document is admitted for the jury to determine its authenticity). Nevertheless, this Court ruled that Volvo could object to the documents based upon any other ground under the Rules of Evidence. Thus, Volvo's argument that this Court automatically admitted any document which had been presented in the document depository even if the document was irrelevant, is erroneous.

6. Failure to Recall Witnesses

Volvo claims that this Court committed prejudicial error by precluding Volvo from recalling plaintiffs' expert witnesses after this Court withdrew the sanction of allowing the jury to reach a negative inference based upon Volvo's failure to comply with discovery requests. These experts had already testified fully and Volvo had been allowed to cross-examine them. Recalling these witnesses would have been a needless consumption of time.

C. DENIAL OF MOTION FOR CONTINUANCE AND SERVICE

Volvo asserts that the Court's denial of the motion for continuance and severance following Trebol and Gonzalez codefendants' consent to entry of default on the eve of trial constituted error. Volvo has failed to articulate a reason why a continuance of the trial date would have made a difference, nor how Volvo was prejudiced by the denial of the motion for continuance and severance.

When considering a motion for continuance, a trial court should take into consideration and weigh the following factors: the reason for the request for continuance, complexity of the case, whether the movant has contributed to the need for the continuance, the inconvenience to the others including the court, witnesses, and the opposing party, and the likelihood of prejudice to the movant if the continuance is not granted. F.D.I.C. v. Houde, 90 F.3d 600, 608 (1st Cir. 1996) (citation omitted).

This was a class action alleging five aspects of a scheme to defraud about 9,000 individuals over a ten year period, which raised complex legal issues during a lengthy and contentious pretrial phase, which resulted in a case volume involving more than 698 docket entries as of June 24, 1996, the date trial began. Trebol and Gonzalez codefendants consented to the entry of default against them at 4:27 p.m. on the Friday prior to the start of trial. Throughout the pretrial phase of this case, Trebol, Gonzalez and Volvo codefendants had presented a

common defense, using the same witnesses, similar documentary evidence, and similar legal arguments in their defense. Therefore, Volvo should have been prepared to continue in their absence.

Postponing the trial date would have added substantial cost and delay to the proceedings in the case at bar. Although the jury had not been impaneled by the time of Volvo's motion for continuance, there were 100 individuals who had been called for the voir dire panel to perform their jury duty service on the date of trial. Volvo's vague allegations that it experienced prejudice would have not been cured by a continuance of the trial, or the severance of a trial involving allegations of conspiracy.

D. PREJUDICIAL CONDUCT OF JUDGE

Volvo reiterates the allegations contained in its previous motion for mistrial and recusal based upon the imposition of sanctions, and further asserts that this Court created a hostile atmosphere for defendants throughout the duration of the pretrial and trial proceedings. Volvo finds fault with this Court's comments to the lawyers during bench conferences, some comments in open court, a sanction imposed and later removed, permission of plaintiffs' attorney's conduct of the examination of witnesses, and error in deciding the motion for mistrial.

During trial, this Court denied Volvo's motion for mistrial which raised several of these same issues. After further consideration of Volvo's argument, this Court finds that there was no error in the questions or comments of this Court. See Kramer v. U.S., 408 F.2d 837, 841 (8th Cir. 1969) (court "may ask questions and had prerogative of commenting directly on witnesses and their testimony,") and Cigna Fire Underwriters v. MacDonald & Johnson, 86 F.2d 1260, 1270-72 (1st Cir. 1996) (comments by the judge during a pre-trial hearing in an attempt to settle the case would not create a reasonable doubt concerning the judge's impartiality in the mind of a reasonable person). Comments of the judge must be viewed in their complete context to determine what effect those comments may have had on the jury. Goichman, 547 F.2d at 784. The record, recopied substantially in Volvo's motion and plaintiffs' opposition, speaks for itself.

In addition, Volvo asserts that this Court committed error by failing to interrupt the trial to take the deposition of an individual concerning allegations which are under seal. There was no error in this Court's decision Suspension of the proceedings in the middle of trial to investigate ambiguous allegations lacking any evidentiary foundation, and directly contradicted by evidence in the record, would have made a mockery of the judicial system.

E. JURY INSTRUCTIONS, VERDICT AND RESPONSE TO JURY QUESTION

Volvo asserts that the jury instructions on liability and damages, verdict on liability and damages, and the Court's response to the jury's questions during deliberations constitute prejudicial error. After due consideration of the issues raised and a review of the record, this Court finds that there was no error in the jury instructions taken as a whole, the verdicts, or this Court's refusal to read portions of the transcript to the jury.

F. ALLEGED ERRORS IN PRETRIAL ORDERS

Volvo insists that this Court engaged in prejudicial error in the disposition of the following pretrial matters: 1) identification and certification of the class, 2) failure to dismiss the Second Amended Complaint, and 3) denial of Volvo's motions in limine to exclude plaintiffs' experts. Volvo reiterates allegations that this Court erroneously denied its previous motions. Volvo's arguments do not raise any new contentions, therefore, this Court will not address these issues further.

IV. CONCLUSION

Based upon all the evidence presented at trial and the parties arguments, the Court does not find that allowing the jury verdict to stand would constitute a miscarriage of justice, nor that Volvo is entitled to judgment as a matter of law. Therefore, defendant's motion for a new trial is hereby DENIED.

IT IS SO ORDERED.

In San Juan, Puerto Rico, this 7th day of October, 1996

/s/

JAIME PIERAS, JR.
U.S. DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF PUERTO RICO

LUIS BONILLA, et al.

v.

Case No. CV 92-1795

TREBOL MOTORS CORPORATION, et al.

MOTION

Date Filed:4/29/96Dkt 50

Title: Motion to Set Date for Requesting Exclusion from Class

Date: 5/2/96

ORDER
RULING

GRANTED. The date by which individuals must excludethemselves from the class is May 31, 1996.

/s/
U.S. District Judge

IN THE UNITED STATE DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

LUIS BONILLA, et al.
Plaintiff

vs. CIVIL NO. 92-1795 (JP)

TREBOL MOTORS CORPORATION, et al.

Defendant

ORDER ON BIFURCATION

The Court has before it plaintiffs' motion to bifurcate the Trial, and oppositions of codefendant Volvo Car Corporation's ("Volvo codefendants") , Trebol Motors Corporation, Trebol Motors Distributing, Showroom Auto Services Inc. ("Trebol codefendants"), and Conchita Navarro de- Gonzalez and Ricardo Gonzalez Navarro ("Gonzalez codefendants"), and their respective supplements (docket Nos. 386, 402, 404, 413, 445, 446 and 447).

I. **INTRODUCTION**

This is a class action for money damages for codefendants' alleged violations of the Organized Crime Control Act known as Racketeer Influenced and Corrupt Organizations ("RICO"). See 18 U.S.C. SS 1961-1968. The plaintiff class is comprised of individuals and corporations who purchased Volvo automobiles from Trebol Motors during the time period from 1984 to the present. Plaintiffs allege that

codefendants engaged in a scheme to defraud consumers of Volvo automobiles, models 240 GLE, in Puerto Rico, by selling a Volvo model 240 DL as if it were a Volvo model 240 GLE. Codefendants contend that they imported the chassis of the Volvo 240 DL model, with factory options, and made port additions to those automobiles in Puerto Rico, thereby converting the vehicles into Volvo 240 GLEs. They deny that this activity violated any provision of RICO.

Plaintiffs have moved this Court to bifurcate the Trial in this case, pursuant to Rules 42(b) and 23(d) of the Federal Rules of Civil Procedure. Plaintiffs, in their first motion, suggest that the Trial be bifurcated into three separate phases: liability, class damages and individual damages of the class members estimated to be 8, 000 to 10,000. During the Further Initial Scheduling Conference held with the Court and all codefendants on March 19, 1996, and in plaintiffs' supplemental motion to bifurcate, plaintiffs proposed another suggestion of bifurcation into two phases: liability and damages.

Codefendants oppose plaintiffs' motion, arguing that various factors weigh against the bifurcation: convenience, prejudice, expedition and economy, similarity between issues of liability and damages, issue of damages is not so complex as to warrant a separate trial, evidence for each issue is not substantially different, no possibility of juror bias or confusion created by holding a single trial. Furthermore, Volvo

codefendants assert that the bifurcation of this Trial would result in a violation of their Seventh Amendment rights to trial by jury if the issue of damages were submitted to a special master following the liability phase of trial.

II. BIFURCATION

"The federal courts have used bifurcated trial in class actions when doing so would further convenience, manageability and the ends of justice." Maenner v. St. Paul Fire and Marine Ins. Co., 127 F.R.D. 488, 490 (N.D. Mich. 1989), Rule 42(b) of the Federal Rules of Civil Procedure, the rule which authorizes bifurcation, reads as follows :

> The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, . . . , or of any separate issue or of any number of claims, . . . , or issues, always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States.

Furthermore, Rule 23(d) of the Federal Rules of Civil Procedure, concerning case management issues in class actions, reads as follows:

> . . . the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument.

Plaintiffs request that the Trial be bifurcated into a first phase dealing with the issue of liability, and a second phase dealing with the issue of damages, and have suggested a third phase, if necessary, concerning individual damages.

Before reaching the issue of bifurcation of the Trial into a liability phase and a damages phase, however, it is essential that this Court determine, as a matter of law, what is the appropriate theory of damages. During the FISC, plaintiffs proposed three different theories for recovery of damages in this cause of action: disgorgement, meaning a recoupment of codefendants' profit derived from the alleged racketeering activities; the price each class member paid for each altered vehicle without any set off for the value of the vehicle; and the price each class member paid for each altered vehicle set off by the value of the vehicle.

Trebol codefendants have opposed the first and second theories of damages (docket Nos. 454 and 455). As to the first theory of damages, Trebol codefendants have submitted a recent decision from the United States District Court for the Northern District of Illinois which specifically disallows the disgorgement theory of damages in a civil RICO action. City of Chicago Heights, Ill. v. Lobue, 914 F. Supp. 279 (N.D. Ill. 1996).

After careful consideration of all the arguments, this Court hereby **ORDERS** that plaintiffs' shall not be permitted

to present evidence to the jury at Trial concerning the disgorgement theory of damages. The statutory provision which allows for a private plaintiff to obtain damages under civil RICO specifically states as follows:

> Any person injured in his business or property by reason of violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee. 18 U.S.C. § 1964(c).

This statutory provision of civil remedies for a civil RICO plaintiff "is strictly compensatory in nature -- it focuses only on the losses incurred by the private plaintiff." Lobue, 914 F. Supp. at 283. The statute does not permit plaintiffs to recover codefendants' profits derived from the alleged racketeering activities. Therefore, no evidence regarding the disgorgement theory of damages shall be admitted at Trial.

Plaintiffs assert that the injury they suffered is the differential between the value of the car and the price as paid. Therefore, the Court hereby **FINDS** that an appropriate measurement of damages is plaintiffs' third proposal: the price that each plaintiff paid for the specific Volvo vehicle minus the value of the vehicle which plaintiff purchased. Prior to Trial, the parties shall stipulate the amount that each plaintiff paid for the Volvo vehicle they purchased, based upon all relevant documentary evidence. During Trial, the parties will be

permitted to present evidence to the jury concerning the issue of the value of the various vehicles. Codefendants can argue based upon the evidence that plaintiffs did not in fact suffered any injury because the purchase price of the vehicle equals the value of the vehicle.

Plaintiffs further contend that since they are arguing a theory of fraud, that the appropriate measurement of damages should not be limited by the value of the vehicle. Aetna Casualty Surety Company v. P & B Autobody, 43 F.3d 1546 (1st Cir. 1994). Aetna involved a scheme to defraud the Aetna insurance company, by individual owners of luxurious vehicles who would present fraudulent claims concerning accidents which never occurred or which were intentionally caused, which would be verified by the autobody repairman, who would then submit the fraudulent claims to the insurance company for payment.

In Aetna, the parties agreed to bifurcate the trial into a liability and a damages phase. at 1567. After the first phase, the jury found defendants liable. Defendants then argued that the issue of damages had to be submitted to a jury. Defendants contend that although a portion of the claims were fraudulent, there was a portion of the claims submitted which was valid. Therefore, a jury had to determine which portion of the claim was valid, and to set-off the entire damage amount by the amount of the valid claim. The First Circuit, however, rejected

this argument. The Court held that defendants materially breached the insurance contract with Aetna, and therefore, defendants were not entitled to assert any rights under the insurance contract. Consequently, the Court held that plaintiffs were entitled to "damages equal to the entire amount of its payments on fraudulent claims, regardless of any portion of the claims that might have been shown to be supportable if no fraudulent enlargement of the claims had occurred." Id. at 1568. Based upon Aetna, this Court FINDS that the second theory of damages is permissible, if the facts as determined at trial support plaintiffs' allegations.

The next question of case management is whether the Trial should be bifurcated into one phase concerning liability, and one phase for individual damages. It has been held that " [a] class with a large number of claimants with the identical issue of liability but with varying fact patterns as to the issue of damages necessitates bifurcation in order to conserve judicial time." Ellison v. Rock Hill Printing & Finishing Company, 64 F.R.D. 415, 418 (D.S.C. 1974).

Codefendants argue that the issues of liability and damages in a civil RICO action are too interwoven to permit the bifurcation of these issues, since as an essential element of plaintiffs' prima facie case, plaintiffs must prove the causal nexus between plaintiffs' injury and codefendants' alleged racketeering activities. This causal nexus, however, can be proven by

evidence presented by the named class representatives. Therefore, the Court hereby **GRANTS** plaintiffs' motion for bifurcation of the Trial into a liability phase and a damages phase. The same jury shall sit and decide all issues of fact in the two phases. See Maenner, 127 F.R.D. at 491.

The class SHALL be divided into three separate categories of class members: those plaintiffs who purchased a Volvo model DL which had been identified as a Volvo model GLE in the 200 series; those plaintiffs who purchased a Volvo model DL which had been identified as a Volvo model DLWA in the 200 series; and those plaintiffs who purchased a Volvo model DL which had been identified as a Volvo model DL. Plaintiffs must present evidence that each subset of class members suffered an injury, and that there is a causal nexus between the injury suffered and codefendants alleged racketeering activities.

Accordingly, the Court will conduct a Jury Trial on all issues of liability which are common to the class, with the class representatives presenting evidence concerning their individual damages. The jury will then return a verdict determining whether defendants are liable. If plaintiffs in the case at bar are unsuccessful in proving their allegations concerning liability during the first phase of Trial, then the case will end there, and judgment shall be entered for defendants. If, however, plaintiffs are successful in proving their allegations concerning liability,

then the issue of the damages suffered by each individual class member must be determined.

This second issue will require the presentation of further evidence and testimony of witnesses, only if there is a genuine issue of material fact. Plaintiffs assert that the amount of damages suffered by each plaintiffs can be easily discerned by a mathematical calculation involving numbers which are clearly set forth in documentary evidence. If such is the case, the Court will entertain the appropriate motions at the relevant time.

IT IS SO ORDERED.

In San Juan, Puerto Rico, this 16 day of April, 1996.

/s/

JAIME PIERAS, JR.
U.S. DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

LUIS BONILLA, et al.

Plaintiff

vs. CIVIL NO. 92-1795 (JP)

TREBOL MOTORS CORPORATION, et al.

Defendant

ORDER ON THE THIRD AMENDED COMPLAINT

Plaintiffs' Motion submitting the third amended complaint (docket No. 395) is hereby **DENIED**. Codefendants Trebol Motors Corporation, Trebol Motors Distributing, and Showroom Auto Services ("Trebol codefendants"), Volvo Car Corporation ("Volvo codefendants"), Conchita Navarro-de Gonzalez and Ricardo Gonzalez Navarro ("Gonzalez codefendants") oppose the amendment of the complaint (docket Nos. 433, 434, and 437).

Plaintiffs filed their first complaint on June 16, 1992, and have amended the complaint twice thereafter. The third amended complaint raises for the first time causes of action pursuant to the Puerto Rico Civil Code. Plaintiffs have known about the factual allegations which underlie the newly raised cause of action since the time that they filed the first complaint. This case is scheduled for Trial on June 10, 1996. To allow

plaintiffs to amend the complaint at this time would cause undue delay to the proceedings and would be unfair to all parties, who are completing final stages of pretrial proceedings in preparation for trial.

IT IS SO ORDERED.

In San Juan, Puerto Rico, this 10th day of April, 1996.

JAIME PIERAS, JR.
U.S. DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

LUIS BONILLA, et al.

Plaintiff

vs. CIVIL NO. 92-1795 (JP)

TREBOL MOTORS CORPORATION, et al.

Defendant

STATUS CONFERENCE ORDER

The parties met with the Court on May 17, 1995, for a Status Conference, represented by counsel: Jose F. Quetglas Alvarez, Esq., Jose F. Quetglas Jordan, Esq., and Jose Carazo Quetglas, Esq., for the plaintiffs; Maria del Carmen Taboas, Esq., Salvador Antonetti, Esq., and Heriberto Burgos, Esq., representing Trebol Motors Corporation, Trebol Motors Distributing, Showroom Auto Services Inc., Conchita Navarro de Gonzalez and Ricardo Gonzalez Navarro; Abelardo Ruiz Suria, Esq., and Rafael Perez Bachs, Esq., representing Volvo Car Corporation; William L. Naveira, Esq., representing Bansander Leasing; Rafael Moran Loubriel, Esq., representing VELCO; Danilo E. Eboli, Esq., representing Scotia Bank; and Jose A. Diaz Algarin, Esq., representing Leaseway of Puerto Rico.

Originally the parties were supposed to meet with the Court on this date for an Initial Scheduling Conference. At the

request of codefendants, the Court changed the Initial Scheduling Conference to a Status Conference in order to provide an opportunity to discuss a motion to dismiss which defendants were preparing, and to resolve certain discovery disputes (docket Nos. 164 and 165).

I. PRELIMINARY ORDERS

1. During the Status Conference, the parties discussed their relative positions in relation to codefendants Trebol Motors Corporation, Trebol Motors Distributing, Showroom Auto Services, Inc., Conchita Navarro de Gonzalez and Ricardo Gonzalez Navarro's motion to dismiss. After careful consideration to the parties arguments, codefendants' motion to dismiss is hereby **DENIED** (docket No. 167). It is evident that plaintiffs' Second Amended Complaint and RICO Statement do not comply with Rule 9(b) of the Federal Rules of Civil Procedure. Plaintiffs have alleged sufficient facts to state a claim upon which relief can be granted. Plaintiffs have generally alleged that codefendants participated in a fraudulent scheme which entailed a three step process. First, defendants imported into the Commonwealth of Puerto Rico less expensive models of the 240 series and other series, as well as motor vehicles' parts and badges. Once in Puerto Rico, defendants modified or altered these motor vehicles, or had them modified or altered, within the Commonwealth of Puerto Rico by, at a minimum, attaching badges that identify the motor vehicles as

superior models, converting them into [240 GLEs]. Subsequently, defendants sold the Volvo Vehicles at a substantially higher price than the price that defendants would normally charge for the less expensive models with such alterations and modifications. In essence, the Second Amended Complaint alleges that the defendants masqueraded Volvo models 240 DL as their pricier up-scale cousins, Volvo models 240 GLE.

In a RICO case alleging mail and wire fraud, the First Circuit has clearly stated that "dismissal should not be automatic once the lower court determines that Rule 9(b) was not satisfied . . .", rather, ". . . the court should make a second determination as to whether the claim as presented warrants the allowance of discovery and if so, thereafter provide an opportunity to amend the defective complaint." New England Data Services v. Becher, 829 F.2d 286, 290 (1st Cir. 1987). Plaintiffs in the case at bar, like plaintiffs in New England have alleged a general scheme which was plausibly meant to defraud plaintiffs. Furthermore, defendants in the case at bar, like defendants in New England, do not live in the same state, and some defendants even reside in a different country. Assuming the fraudulent scheme existed as stated by plaintiffs, one can infer that codefendant Volvo Car Corporation in Sweden and codefendants, Trebol Motors Corporation, Trebol Motors Distributing, and Showroom Auto Services, Inc., in Puerto Rico

utilized the mails and wires for their communications to implement the fraudulent scheme. Id. From the facts that plaintiffs have alleged along with logical inferences from those facts, plaintiffs have stated a claim upon which relief can be granted. Therefore, discovery in this case shall commence.

2. Counsel for Leaseway, Scotia Bank, VELCO and Bansander Leasing were also present at the Status Conference to discuss a discovery dispute. Plaintiffs had requested certain documents from these institutions in order to identify members of the class and gather evidence to support plaintiffs' RICO claims. At the outset, the Court notes that Leaseway has already complied completely with plaintiffs' request for document production. The other institutions, however, have not complied with plaintiffs' requests for document production, alleging that production of the documents would be both burdensome and expensive. Given the necessity of the information requested to plaintiffs' ability to support their RICO claims, the financial institutions are hereby **ORDERED** to comply with plaintiffs' requests for discovery.

3. The Court has already certified the members of plaintiff class as follows:

> All persons who purchased or acquired from any of the defendants, from 1984 to the present, Volvo motor vehicles of the model 240 GLE which did not conform to the standards and specifications of the model.

The parties are hereby **ORDERED** to continue with the procedures for notifying the members of the class.

4. The parties agreed to meet with each other for a Rule 311 Conference on June 9, 1995, at 1:30 p.m., in the law offices of Maria del Carmen Taboas, Esq., at Fiddler, Gonzalez & Rodriguez.

II. SCHEDULE WITH THE COURT

An Initial Scheduling Conference is hereby **SET** for **July 10, 1995, at 2:00 p.m.,** at the Chase Manhattan Bank Building unless otherwise notified. The representatives of the financial institutions are not required to appear at this Conference.

IT IS SO ORDERED.

In San Juan, Puerto Rico, this 22 day of May, 1995.

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JAIME PIERAS, JR.
U.S. DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF PUERTO RICO

LUIS BONILLA, et al.

v. Case No. CV 92-1795

TREBOL MOTORS CORPORATION, et al.

MOTION

Date Filed:4/18/96Dkt 481

Title: Plaintiffs' Motion to Clarify the Court's Order on the Third Amended Complaint

Date: 4/25/96

ORDER RULING

GRANTED. Plaintiffs' Third Amended Complaint which substitutes two named plaintiffs and incorporates the Amended class definition is hereby ACCEPTED.

/s/
U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

LUIS BONILLA, et al.

Plaintiffs,

v. CIVIL NO. 92-1795 (JP)

TREBOL MOTORS CORPORATION, et al.

Defendants

THE GONZALEZ DEFENDANTS' MOTION TO VACATE JUDGMENT AND ENTER JUDGMENT IN THEIR FAVOR

Defendants, Ricardo Gonzalez Navarro and Conchita Navarro De Gonzalez (the "Gonzalez defendants") move the Court pursuant to Rule 59(e) to vacate the "judgment" and enter judgment in their favor or, solely in the alternative grant them a new trial pursuant to Rule 59(a) . In support of this motion, the Gonzalez defendants state the following.

1. Although the Court has denominated its order of October 7, 1996, which was docketed on October 10, 1996 as a "Final Judgment," the order is technically not "a final judgment" as that term is used in Rule 54(a) of the Federal Rules of Civil Procedure. Rule 54 requires that a judgment be on a separate piece of paper and that nothing other than the term of the judgment be included. The rule specifically states, "A judgment shall not contain a recital of the pleadings, the report of a master or the record of prior proceedings. FRCP

59(a). As a result, this Motion may technically be premature and is being filed solely to protect the record and preserve the points for appeal.

2. The complaint failed to state a claim upon which relief can be granted. (See Volvo motion for new trial at 44-49, Docket #814. See also, O'Ferral v. Trebol Motors 45 F.3d 561 (1st Cir. 1995)

3. The complaint did not allege more than one scheme but instead various aspects of the same scheme.

4. The Court erred in denying the motion for summary judgment.

5. The Court erred in denying the Rule 50 motion made by Volvo at the close of plaintiffs' case, at the close of Volvo's case, and upon the close of all the evidence. Under Frow v. De La Vega. 82 U.S. (15 Wall) 552, 21 Led. 60 (1872), a finding of no liability as to Volvo would require a finding of no liability as to the Gonzalez defendants, including Trebol. Id.

6. The Gonzalez defendants do not intend to burden the Court by rehashing the arguments previously made in the premature filings of both Volvo and the Gonzalez defendants. If the Court would like further briefing, the Gonzalez defendants would happily provide the same to any and all issues raised herein. In the meantime, defendants adopt the Volvo motion for a new trial (Docket No. 819) and the

Gonzalez motion for new trial (Docket No. 856). Furthermore, defendants assume that the Court's ruling as to those motions will be the same.[1]

7. The Court erred in refusing to dismiss the Monroney claims and failing to determine, as a matter of law, that the Gonzalez defendants do not have a statutory duty to disclose pursuant to the Automobile Information Disclosure Act, 15 U.S.C. 1231 et seq. and the "Act to Protect Motor Vehicle Buyers in Puerto Rico" 23 L.P.R.A. section 1021 et seq. The Automobile Information Disclosure Act, 15 U.S.C. 1231 et seq. requires the "manufacturer" of new automobiles to affix in the windshield a disclosure label. The term "manufacturer" is defined by said statute to include any person manufacturing, assembling or importing new automobiles. Mr. Ricardo Ganzalez and Mrs. Conchita Navarro de Gonzalez are not "manufacturers" as defined by law, and therefore, they do not have an affirmative duty to disclose under the Automobile Information Disclosure Act. The "Act to Protect Motor Vehicle Buyers in Puerto Rico" 23 L.P.R.A. section 1021 et seq. imposes on the "seller or dealer" the duty to affix in the car a disclosure label. Mr. Ricardo Gonzalez and Mrs. Conchita Navarro de Gonzalez are not "seller or dealer" and therefore, they do not have an affirmative duty to disclose under the "Act

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[1]An order denying this motion is necessary in order for an appeal to be lodged.

to Protect Motor Vehicle Buyers in Puerto Rico". Neither the Automobile Information Disclosure Act, 15 U.S.C. 1231 et seq. nor the "Act to Protect Motor Vehicle Buyers in Puerto Rico" 23 L.P.R.A. section 1021 et seq. provide for an express or implied private cause of action. These statutes do not require a disclosure of the type of information which the plaintiffs contend they were entitled to receive. Nowhere do these statutes require that plaintiffs be told that a vehicle has been customized (or additional options and equipment added) in port. The Court also erred in excluding testimony that would establish that DACO performed periodic inspections on Trebol and had never notified Trebol of any deficiency in its duty to disclose.

8. The Court erred in allowing evidence of the so called "tax fraud" and "money laundering" admitted as evidence under Evidence Rules 401 and 402 and which should have been excluded pursuant to Evidence Rule 404(b). Tax law require that the taxpayer be granted an administrative hearing in which he be allowed to present evidence and to make payment (if a deficiency is determined) before tax fraud may be established. The Gonzalez defendants were denied this right.

9. The Court erred in permitting the use of plaintiffs' experts and barring defendants' experts and allowing CPA's to testify on legal issues.

10. The Court deprived the Gonzalez defendants of due process of law in violating in mid-trial the Court's order of Bifurcation and providing no notice to the Gonzalez defendants that liability and damages would be tried together.[2] (See Declaration of Salvador Antonetti, a copy is attached. The original is attached to Trebol Motors' Rule 59 motion.)

11. The Court failed to provide the Gonzalez defendants a meaningful opportunity to be heard, present evidence, cross-examine plaintiffs' witnesses, and present its own witnesses.

12. The Court deprived the Gonzalez defendants of the right to have the same trier of fact assess the damages as Volvo. As a consequence, the Gonzalez defendants were deprived of a jury trial. Plaintiffs' counsel requested that the Gonzalez defendants not be included in the damages phase of

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[2]At the hearing on August 29, 1996, the Court seemed to question the sincerity of defendants' claim that they did not go forward because of financial reasons, yet came to the hearing with two new lawyers. In fact, there was one new lawyer, Mr. Rovell. Mr. Cuprill did not participate and was there solely as the bankruptcy lawyer. The attorney fee for Mr. Rovell was less than $10,000. For Trebol and the Gonzalez family to have its lawyer participate at trial would have cost in excess of $250,000 (assuming conservatively 10 hour days, 5 hours on Saturday, no time on Sunday, and 4 days at an average of $200.00 per hour). In view of the above, the Court's criticism is unfair.

the trial which denied them due process. (See affidavit of Michael J. Rovell.)

13. The judgment award is against the manifest weight of the evidence.

14. The damages award was excessive.

/s/
Michael J. Rovell

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/s/
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UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

LUIS BONILLA, et al.,

Plaintiffs,

v. CIVIL NO. 92-1795 (JP)

TREBOL MOTORS CORPORATION, et al., RE: CIVIL RICO CLASS ACTION

Defendants.

UNSWORN DECLARATION
UNDER PENALTY OF PERJURY

I, Salvador Antonetti, of legal age, married, attorney by profession, and a resident of San Juan, Puerto Rico, do hereby declare of my own personal knowledge and under penalty of perjury as follows:

1. My personal and professional circumstances are as aforementioned.

2. As a member of the firm of Fiddler, Gonzalez & Rodriguez, I have represented the Trebol defendants in this matter.

3. It is a matter of record that on June 21, 1996, the Trebol and the Gonzalez defendants filed a motion consenting to entry of judgment as to the well pleaded allegations of the third amended complaint.

4. On June 24, 1996, I was present in the courtroom on behalf of the Trebol defendants when this case

was called for jury trial on liability, pursuant to the bifurcation order of the Court dated April 16, 1996.

5. As the first order of business that day, the Court read a ruling disposing of certain motions filed by Volvo Car Corporation and accepting the notice of default filed by the Trebol and Gonzalez defendants.

6. After issuing its rulings, the Court declared a recess, the record was closed and the presiding judge, Hon. Jaime Pieras, Jr., Senior U.S. District Judge, descended from the bench towards chambers, with other court personnel.

7. At that point, I asked the law clerk assisting the presiding judge, Ms. Courtney Carroll, before she entered chambers, that she inquire of the Court whether the attorneys of the Trebol and Gonzalez defendants could be excused.

8. Ms. Carroll entered chambers and almost immediately returned to the courtroom, and responded to my question by stating that the attorneys were excused.

9. The Trebol defendants did not receive notice from the Court that it had in any way modified its Order of Bifurcation. Thus, the Trebol defendants had no opportunity to cross examine witnesses, object or argue as to evidence concerning the damages allegedly suffered by class members.

In San Juan, Puerto Rico, this 23rd day of October, 1996.

/s Salvador Antonetti

UNITED STATES DISTRICT COURT
DISTRICT OF PUERTO RICO

LUIS BONILLA, et al.,

Plaintiffs,

v. CIVIL NO. 92-1795 (JP)

TREBOL MOTORS CORPORATION, et al., RE: CIVIL RICO CLASS ACTION

Defendants.

UNSWORN DECLARATION
UNDER PENALTY OF PERJURY

I, Michael J. Rovell of legal age, married, attorney by profession, and resident of Lake Forest, Illinois do hereby declare of my own personal knowledge and under penalty of perjury as follows:

1. My personal and professional circumstances are as aforestated.

2. I have represented the Gonzalez Defendants in this matter.

3. On August 29, 1996 I spoke personally with Nereida Melendez and asked her what occurred in chambers with respect to the damages phase of this matter. Ms. Melendez indicated she was present in chambers while counsel for Bonilla and Volvo discussed the jury instructions.

4. During the discussion on the damages instructions, the parties addressed the damages instructions relating to the Trebol and Gonzalez Defendants. At this time,

Plaintiff's Counsel Allan Kanner told the Court that it was his belief that the issues relating to the damages against Trebol and Gonzalez Defendants' should be heard separately from the damages against Volvo.

In Chicago, Illinois this 23rd day of Oct. 1996.

/s/
Michael J. Rovell by
Bruce J. Goodhart

This has been forwarded to Mr. Michael J. Rovell in Europe and he has approved it and has empowered and authorized his partner Bruce Goodhart to sign on his behalf as he is presently out of the Country.